90-569

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 17, 1990

QUESTIONS PRESENTED

Petitioners are a certified class of 800 Black Detroit police officers who were laid off in reverse seniority order from their jobs in 1979 and 1980. The district court, finding a violation of Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment, ordered reinstatement of all laid off officers, both Black and White, and enjoined further uniformed police layoffs without court approval. The Court of Appeals for the Sixth Circuit initially reversed and remanded in 1987. On remand, the district court declared the case to be moot and dismissed it, on the grounds that all the officers had been rehired by the City and Blacks then constituted a majority of the union, making them capable of protecting themselves through union democracy. Petitioners appealed the determination of mootness. The court of appeals reversed the determination of mootness, but then ordered the case dismissed, on the grounds that §703(h) of Title VII immunized the City's layoffs from attack because they were done pursuant to a bona fide seniority system, and it further found that the union's conduct was similarly immunized from attack.

The questions presented are:

(1) Did the layoffs violate Petitioners' Equal Protection rights where, at the time of the layoffs, the City of Detroit was under an unmet constitutional obligation to remedy the effects of its pervasive intentional racial discrimination in Police Department employment.

(2) In a case in which no formal complaints were filed with the EEOC, does the Equal Protection Clause, enforceable through 42 U.S.C. §1983, empower federal courts to enjoin such layoffs, notwithstanding §703(h) of Title VII of the Civil Rights Act of 1964, under which the routine application of a seniority system does not violate Title VII?

(3) Where the DPOA (Petitioners' union) failed to bargain about these layoffs and where the Petitioners' race limited the union's efforts to find alternatives to the layoffs,

is the union liable under its Duty of Fair Representation and 42 U.S.C. §1981, even if layoffs are not a mandatory subject of bargaining?

(4) Will the passage of the Civil Rights Act of 1990 require remand of this case so that the Sixth Circuit Court of Appeals may revisit its decision?

LIST OF PARTIES

With the exception of the Detroit Branch of the NAACP, all parties with an interest in this matter are fully contained on the cover page.

The Detroit Branch of the NAACP is the biggest one of nearly 2,000 subsidiary units of the National Association for the Advancement of Colored People, a New York Corporation, with current headquarters at 4805 Mt. Hope Dr., Baltimore, MD 21215, (301) 486-9191. The NAACP, a membership organization, seeks to confront and combat racial discrimination in all areas of American life, including in law enforcement.

The Guardians, Inc. is a Michigan Corporation, with a membership of Black Police Officers, drawn primarily, but not exclusively, from the City of Detroit's Police Department. Its aims are to advance the interests of blacks and other non-whites in the law enforcement field, including to confront racial discrimination, segregation and prejudice where viewed as impediments to equal opportunity for black officers.

The 10 individual Petitioners were all Detroit police officers and members of the Guardians at the time of trial below.

The named Plaintiffs-Petitioners are the representatives for a certified class which consists of black uniformed police officers in the City of Detroit who were laid off in either 1979 or 1980 from their employment with the Detroit Police Department.

.....

Thomas I. Atkins, Esq.
Counsel of Record for Petitioners

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INTRODUCTORY PRAYER

Now come the Petitioners to respectfully request that this Court grant the Petition for a Writ of Certiorari to the 6/18/90 Opinion of the Court of Appeals for the Sixth Circuit, so that Petitioners will be permitted to discuss the rulings below which conflict with decisions of other circuits and with the rulings of this Court.

Respectfully submitted,

.....

Thomas I. Atkins

CITATIONS TO OPINIONS BELOW

The opinions below which are implicated in this Petition are:

1. *NAACP v. DPOA*,
   591 F. Supp. 1194 (E.D. Mich. 1984)
2. *NAACP v. DPOA*,
   629 F. Supp. 1173 (E.D. Mich. 1985)
3. *NAACP v. DPOA*,
   676 F. Supp. 790 (E.D. Mich. 1988)
4. *NAACP v. DPOA*,
   685 F. Supp. 1004 (E.D. Mich. 1988)
5. *NAACP v. DPOA*,
   821 F.2d 328 (6th Cir. 1987)
6. *NAACP v. DPOA*,
   900 F.2d 903 (6th Cir. 1990)

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was rendered on April 9, 1990. The Court of Appeals denied Petitioners' request for Rehearing and Rehearing En Banc on June 18, 1990. *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The *Equal Protection Clause of the Fourteenth Amendment* is the only constitutional provision directly implicated in this Petition.

Statutory provisions implicated are:

2. *42 U.S.C. §1981*

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Rev. Stat. @ 1977.

3. *42 U.S.C. §1983*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. *42 U.S.C. §2000e et seq.*, particularly §703(h), which provides protection for bona fide seniority systems from suit under Title VII.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. @ 2000e-2(a), provides;

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

5. *§703(h) of the Civil Rights Act of 1964*, as set forth in 42 U.S.C. §2000e-2(h) states, in pertinent part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

Petitioners are a certified class of eight hundred Black police officers who were laid off from their jobs in the Detroit Police Department. The layoffs in question occurred in two waves, one in October of 1979, the other in September 1980. A total of eleven hundred officers were laid off. The Complaint in this case, filed on September 30, 1980 by the NAACP, the Guardians Police Association, and ten individual laid off officers, alleged that these layoffs *inter alia*, violated the Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1981, and §1983.

The Plaintiffs' Equal Protection claim was grounded in more than two dozen pages of findings made by Judge Keith in *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), holding the City liable for past intentional racial discrimination violative of the Equal Protection Clause. Included were findings that the City of Detroit had: (1) systematically excluded Blacks from consideration for hiring; (2) refused to hire all but a token number of Blacks; (3) segregated those Blacks who were hired; and (4) prevented Blacks from obtaining promotions to ranks above police officer. *Baker v. City of Detroit, supra.*[1]

Petitioners' case was filed against the City of Detroit and the Detroit Police Officers Association (DPOA), the union which was certified to represent all uniformed police officers. The *Baker* findings formed the basis for the instant controversy because at the time of the layoffs in 1979 and 1980, the City had not yet remedied the effects of its prior discriminatory conduct. They had the effect of reducing Black representation on the uniformed force from 39% to 26%, at a time the percentage of Blacks necessary for the City to have eliminated the effects of its prior

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[1] The findings in *Baker*, affirmed *in toto* by the Court of Appeals, *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), arose because of an unsuccessful challenge by White police sergeants to a one-for-one affirmative promotion plan implemented in 1974 by the City after the Board of Police Commissioners determined such a plan was necessary. The findings in *Baker* were *de novo*, and based on the record made in the trial of a case in which one of the Petitioners herein, the Guardian Police Association, was an intervening Defendant.

conduct was slightly in excess of 50%. *NAACP v. DPOA*, 591 F. Supp. 1194, 1200-01 (E.D. Mich. 1984).

Petitioners alleged that the City, by virtue of the findings of past intentional discrimination in ***Baker***, was under an affirmative duty to remedy not only the *fact* of that past discrimination but also its *effects*, including the duty *not to abandon* its effort until the effects had been eliminated "root and branch".[2] The City was sued pursuant to the Equal Protection Clause of the 14th Amendment, and 42 U.S.C. §1983.

Petitioners alleged that the DPOA could have caused the layoffs to be avoided, had the unions's all-white leadership refrained from discriminating on the basis of race. That is, had race not been factored in as a negotiation strategy, alternatives to the layoffs might well have been effected. Petitioners charged that the DPOA's race-based conduct violated both the union's Duty of Fair Representation and Petitioner's rights under 42 U.S.C. §1981.

Petitioners sought declaratory relief under the doctrine of collateral estoppel, asking that the findings of intentional discrimination made in ***Baker*** be deemed binding on the City and the DPOA in the instant case. On 11/17/81 The district court granted that relief, making relitigation of those issues unnecessary. Petitioners thereafter sought Partial Summary Judgment against the City on the issue of liability. On 2/24/84, the district court granted the Partial Summary Judgment Motion, holding:

> "1. That, based on the findings of intentional discrimination in *Baker v. City of Detroit*, 483 F. Supp. 930 (cit. omitted) (E.D. Mich. 1979) . . . (cit. omitted), the City had a constitutionally imposed continuing affirmative obligation not only to stop the discrimination but to remedy all of the effects of the discrimination.

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[2] For these propositions, Petitioners relied on the principles stated in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown I*); *Brown v. Bd. of Education*, 349 U.S. 294 (1955) (*Brown II*); *Green v. New Kent County Bd. of Education*, 391 U.S. 430 (1968); *Columbus Bd. v. Penick*, 443 U.S. 449 (1979); and *Dayton Bd. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*).

"2. That the City had not yet remedied the effects of this prior discrimination when, in 1979 and 1980, it reduced black representation on the police force.

"3. That by these layoffs, which the City knew full well would reduce black representation on the police force, the City breached its affirmative obligation to the plaintiffs in violation of their rights under the Fourteenth Amendment."[3]

Trial commenced in May 1984 on the issues of liability against the DPOA and remedy against the City. The district court's 7/25/84 opinion ordered the reinstatement of *all* laid off police officers, both black and white, and enjoined any further layoffs without court approval. The officers were not granted back pay, but were to retain their full seniority as if they had not been laid off. *NAACP v. DPOA*, 591 F. Supp., @ 1220-1221.

The Court also found that the union had violated the Duty of Fair Representation in its handling of the matter, and made extensive findings as to the history of racial hostility toward DPOA's black members and their aspirations.[4]

Of particular importance to this Petition is the district court's statement that it:

"did not accept the City's position advanced in post-trial argument that Title VII law regarding bona fide seniority systems is controlling in Constitutional litigation".[5]

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[3] *NAACP v. DPOA*, 591 F. Supp. 1194, 1199 (E.D. Mich. 1984). The district court noted the City had admitted in its pleadings that it had made the race-conscious and politically-expedient decision to face a lawsuit by Blacks rather than by whites.

[4] The Court placed the blame for the violation on a union leadership which failed to reflect or be sensitive to its black membership. The district court therefore ordered the union to integrate its leadership bodies and committees within twelve months. *Ibid.*

[5] *NAACP v. DPOA*, 591 F. Supp., @ 1203.

The district court's remedial order, nonetheless, left the seniority system intact.[6]

The City reinstated all the officers in compliance with the district court's injunctive orders. The City and the DPOA appealed as to liability and remedy, and Petitioners appealed the denial of back pay, other monetary relief such as pension credits, and the refusal of the district court to order reinstatement of those class members driven by the illegal layoffs to renounce recall rights in order to secure interim employment.

On 6/12/87, the court of appeals, while affirming the district court's ruling that collateral estoppel properly made the findings in *Baker* binding, remanded the case on the grounds that those findings, *standing alone*, were insufficient to support the relief.[7]

As to the union's liability, the court of appeals held that, as layoffs were not a mandatory subject of bargaining, the DPOA had no duty to bargain over them, and that the failure to negotiate about the layoffs could not be the basis of a Duty of Fair Representation violation. The court of appeals remanded for action consistent with its Opinion, particularly instructing the district court to review Petitioners' §1981 claim against the union.[8]

On remand, the district court denied motions by the City to enter judgment, and by the union for summary judgment, and accepted Petitioners' claim that the remand hearing might produce findings to cure the alleged defects found by the court of

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[6] Petitioners had not directly attacked the seniority system, which was negotiated in 1967 at a time when the City was found to be discriminating. Rather, Petitioners argued that *contractual* seniority rights could not be relied on to defeat *Constitutional* rights.

[7] *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987). The Court of Appeals largely ignored the supplemental, *de novo* findings of liability made by the district court, based on the trial held below in the Spring of 1984.

[8] *NAACP v. DPOA*, 821 F.2d, @ 333. The District Court had not reached this claim in light of its ruling on the Duty of Fair Representation charge.

appeals.[9] However, the district court declined to take any further action on the ground that the case was then moot.[10]

Petitioners appealed the mootness finding. The court of appeals, while agreeing with Petitioners that the case was not moot, ordered the case dismissed anyway.[11]

As it related to the City defendants, the dismissal was premised on the panel's perception of Title VII law and its holding that §703(h) of Title VII, 42 U.S.C. §2000e, immunized the City's layoffs from attack, because the layoffs had been based on the seniority system.[12]

The court also dismissed the claim as to the union, holding that the §1981 claim against the union was dependent upon the claim against the City, which it had already held was barred by §703(h). Citing *Patterson v. McLean*, 109 S. Ct. 2363 (1989), it noted that the §1981 claim was most likely not viable in any event.

A timely Petition for Rehearing was denied on 6/18/90, giving rise to the instant Petition for a Writ of Certiorari.

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[9] *NAACP v. DPOA*, 676 F. Supp. 790, 796 (E.D. Mich. 1988).

[10] *NAACP v. DPOA*, 685 F. Supp. 1004 (E.D. Mich. 1988). The district court's mootness ruling was based on its finding that, at the time of the 1988 remand hearing, the police force, through a combination of recalls and new hires had surpassed the percentage of black representation that the Court had previously found necessary to eliminate the effects of the past intentional discrimination. Similarly, the district court found the claim for relief against the union moot because blacks were now more than 50% of the union and, the Court reasoned, capable of electing leadership that would protect their interests. *Ibid*, @ 1007.

[11] *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990)

[12] The court of appeals assigned no legal significance to the fact that Petitioners were seeking to vindicate *Constitutional* rights, nor to the fact that the City was protected from any collateral action by the DPOA precisely because the challenged layoffs occurred by seniority, nor to the fact that no Title VII complaints had been filed in this case with the EEOC.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Opinion Conflicts with the Decisions of Other Circuits Concerning the Remedial Relationship Between the Equal Protection Clause and Title VII

The Opinion below has created a direct conflict between the Circuits concerning the scope of a district court's powers under the Equal Protection Clause to remedy the effects of intentional past employment discrimination where seniority systems exist, whether or not Title VII complaints are involved.

Prior to this case, the Circuits were in agreement that where a federal court had found pervasive violations of the Equal Protection Clause, it had a duty to eliminate the effects of that discrimination "root and branch", *Green v. New Kent County School Board*, 391 U.S. 430, 438 (1968), and that race conscious remedies are not only permitted but required where color blind approaches would be inadequate, *Swann v. Charlotte-Mecklenburg Board of Education*, 401 U.S. 1, 28 (1971), even if those remedies temporarily prevent the layoffs of some blacks. *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982); *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir. 1983).

In his 7/25/84 opinion, Judge Gilmore ordered that, as a result of its intentional and unremedied discrimination in violation of the Equal Protection Clause, the City must reinstate all officers laid off in violation of that clause. He also enjoined the City from laying off, suspending, or discharging any police officer without prior approval of the Court.[13]

The Sixth Circuit ultimately reversed the injunction, finding it to be barred by §703(n) of Title VII,[14] specifically holding that

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[13] *NAACP v. DPOA*, 591 F. Supp., @ 1220-1221

[14] As earlier noted, on the first appeal the Sixth Circuit found the injunction improper because it was entered solely on the basis of factual findings in *Baker v. Detroit*, 483 F.Supp 930 (E.D. Mich 1979). However, on remand, the District Court held that Plaintiffs could demonstrate that,

the text of §703(h) "establishes an exception to liability for employment discrimination based on race."[15]

The Opinion below failed to recognize that the district court is not limited to Title VII remedies where a claim is grounded in the Equal Protection Clause and not Title VII, an error highlighted by the conflict the Opinion creates with the First and Second Circuit's decisions in *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982),[16] *Arthur v. Nyquist*, 712 F.2d 816 (2d Cir.

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wholly apart from the *Baker* findings, the City's prior unconstitutional acts were a proximate cause of the 1979 and 1980 layoffs. *NAACP v. DPOA*, 676 F. Supp. 790, 796 (E.D. Mich. 1988). It then later held that the issue was moot. *NAACP v. DPOA*, 685 F. Supp. 1004 (E.D. Mich. 1988). It was on appeal from this Order that the Sixth Circuit reversed the mootness finding and held that §703(h) barred the injunction. *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990).

[15] *NAACP v. DPOA*, 900 F.2d 903, 907 (6th Cir. 1990). The Opinion disregarded the fact that the district court injunction was based on a finding of intentional discrimination violative of the Equal Protection Clause, and had nothing to do with Title VII, stating "Congress did not intend that its detailed remedial scheme constructed in Title VII be circumvented through pleadings that allege other causes of action under general statutes."

[16] In *Morgan*, the First Circuit addressed a case quite similar to this one. The court considered the district court's refusal to modify a prior remedial order so as to allow for the layoffs of black administrators during a budgetary crisis. The Court of Appeals held the orders of the district court to satisfy the standards articulated by this Court in *Milliken v. Bradley*, 433 U.S. 267, 280-281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977). Specifically, the First Circuit found that these orders were "reasonable" as required for race conscious remedies. It stated:

> "They were necessary to safeguard the progress toward desegregation painstakingly achieved over the least seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be countenanced."
>
> *Morgan, supra*, at 28

1983).[17] Other Circuit Court opinions addressing the relationship between 1983 and Title VII have also found them to be separate and unrelated.[18]

The Opinion below also conflicts with the remedial power this Court has granted to district courts which seek to remedy the present effects of past racial discrimination in employment where the claim is not based on Title VII. Under such circumstances, precedents from this Court make clear that the scope of the remedy is not defined by constraints contained within Title VII.

While the *Nyquist* and *Morgan* decisions were both rendered in cases where intentional, state-imposed school discrimination had been found, this Court has applied the same broad,

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[17] In *Nyquist*, the Buffalo Teachers Federation challenged a remedial plan ordered by the district court which was designed to achieve a goal of 21% minority teachers through a race conscious system for hiring and laying off teachers. The Second Circuit rejected the Federation's argument that §703(h) of the Civil Rights Act of 1964 invalidated the district court's refusal to lift its remedial order. It found §703(h) inapplicable because:

> "Here, . . . the suit was brought to remedy violations of the Constitution rather than Title VII, and the district court made a finding of intentional discrimination . . .
>
> "Once a local board of education has been found to have employed staff hiring practices that contribute to a racially segregated school system, the District Court has the power to remedy those practices and override seniority systems that perpetuate those practices." *Nyquist, supra*, at 822.

[18] *Ratliff v. City of Milwaukee*, 795 F.2d 612, 623-24 (7th Cir. 1986), cert. denied, 106 S. Ct. 1492 (1986); *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985); *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 612 n.1 (5th Cir. 1983) *Vulcan Society of N.Y. City Fire Department v. Civil Service Commission*, 490 F.2d 387, 390 n.1 (2d Cir. 1973) . Even other panels of the Sixth Circuit itself have handed down decisions which noted the separate nature of Title VII and 1983 remedies: *Day v. Wayne County Board of Auditors*, 749 F.2d 119 (6th Cir. 1984); *Grano v. Department of Development, City of Columbus*, 637 F.2d 1073 (6th Cir. 1980).

flexible rules to remedy intentional, state-imposed Equal Protection violations in the context of employment discrimination.[19]

The case below does not involve the situation found in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the problem was to remedy the disparate impact of unintentional discrimination.[20] The findings of the district court below made clear that the City of Detroit had engaged in long-running, widespread, intentional, racial discrimination in the recruitment, employment, deployment, and promotion of police officers, which had affected and infected every segment of the Detroit Police Department.[21]

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[19] See, *United States v. Paradise*, 107 S.Ct. 1053, 1073 (1987); *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480 (1986). See also, *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971), where Chief Justice Burger wrote for a unanimous court:

> "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the 'condition that offends the Constitution'."

[20] See, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 590 fn. 16 (1984) (District court's order enjoining layoffs of black employees invalidated where there had been no finding of intentional discrimination.) Also see, *Chance v. Board of Examiners and Board of Education of the City of New York*, 534 F.2d 993, 999 (2nd Cir. 1976) (District court's order modifying a layoff, or "excessing" plan, struck down, where "there is no claim that defendant's excessing practices are or have been discriminatory").

[21] See, e.g., *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983); *NAACP v. DPOA*, 591 F. Supp. 1194, 1199 (E.D. Mich. 1984); *NAACP v. DPOA*, 676 F. Supp. 790, 796 (E. D. Mich. 1988). The detailed findings in *Baker* were based, in part, on City of Detroit's detailed admissions of intentional discrimination, but were buttressed by the independent findings of *de jure* conduct made by the district judge in that case.

II.

The Opinion Below Conflicts with Landmark Cases In This Court Concerning the Remedial Reach of The Equal Protection Clause and 42 U.S.C. §1983

The Opinion below conflicts with numerous landmark rulings of this Court which have for more than thirty years provided state and federal courts with direction in identifying and remedying intentional, invidious, racial discrimination, including: *Brown v. Bd. of Education*, 349 U.S. 294 *(Brown II)*;[22] *Louisiana v. United States*, 380 U.S. 145 (1965);[23] *Green v. New Kent County School Board*, 391 U.S. 430 (1968);[24] *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1 (1971);[25] *Keyes v. School Dist.*

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[22] In *(Brown II)*, this Court said the vitality of the Constitutional principles enacted in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) *(Brown I)*, should not yield simply because of disagreement with them. While recognizing the primary responsibility of school authorities for solving the problems of racial discrimination in education, *Brown II* instructed lower courts to be guided by equitable principles in fashioning and effectuating decrees designed to dismantle dual systems and guard against their continuing vestigial effects.

[23] In *Louisiana v. United States*, this Court said that the federal courts have not just the right but the "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

[24] Though *Louisiana v. United States* was a voting rights case, *Green v. New Kent County School Board*, a school desegregation case, imposed the same duty upon an offending state actor as well as the federal courts in remedying Constitutional violations:

> "School boards . . . (under *Brown II*) were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of negro children articulated in *Brown I* permit no less than this . . .
>
> "The obligation of the district courts, as it has always been, is to assess the *effectiveness* of a proposed plan in achieving desegregation." (emphasis added)

[25] *Swann v. Charlotte-Mecklenberg Board of Education* further explicated the duty of federal courts in cases involving remedies for Constitutional violations, holding that:

No. 1, Denver, 413 U.S. 189 (1973);[26] *Columbus Bd. of Educ. v. Penick*, 443 U.S. 666 (1979);[27] and, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979.[28]

In all of these cases, the Court was addressing remedies where either *de jure* segregation had existed in violation of the 14th Amendment's Equal Protection Clause *(Green, Swann, Keyes, Penick, Brinkman)*, or where racially discriminatory statutes violated the Fifteenth Amendment *(Louisiana v. United States)*.

This Court has repeatedly stressed the obligation of the federal courts to assure that racial discrimination is effectively eliminated, and to guard against those actions which might make more difficult the task of elimination. The Opinion challenged by this Petition completely disregarded the City of Detroit's unmet affirmative duty to dismantle, "root and branch",[29] the unconstitutional dual system created by its racially discriminatory employment practices.

"The task is to correct . . . the condition that offends the Constitution."

[26] In *Keyes v. School District No. 1, Denver, Colorado*, the Court had held that remoteness in time between the segregative intent and the actions complained of does not make the actions less intentional when "segregation resulting from those actions continues to exist."

[27] *Columbus Board of Education v. Penick* held that:

"Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment."

[28] In *Dayton Board of Education v. Brinkman*, this Court held that:

"Part of the affirmative duty imposed by our cases, as we decided in *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196 (1972) is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects . . .

"The measure of the post *Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the *effectiveness*, not the *purpose*, of the actions decreasing or increasing the segregation caused by the dual system."

[29] *Green, supra*.

The Opinion also conflicts in principle with decisions of this Court concerning the scope of Title VII. On several occasions, the Supreme Court has addressed the role that Title VII plays in this nation's effort to eradicate employment discrimination. Consistently, Title VII's purpose has been defined as providing an *additional* remedy for invidious employment discrimination. The decisions of this Court have made it clear that the Congress did not intend to force aggrieved employees to look to the provisions of Title VII as their *sole vehicle* for attacking discriminatory employment practices.[30]

By holding that the restrictions of §703(h) of Title VII must be applied to an Equal Protection claim being prosecuted via §1983, the Opinion below ignores that Petitioners have every right, under the precedents of this Court, to pursue a §1983 claim in addition to, and wholly separate from, a Title VII claim. Thus, even if the Petitioners below *had* filed formal complaints with the EEOC, they would not have been precluded from making Equal Protection claims and pursuing them under §1983. That no such complaints were ever filed with the EEOC is an

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[30] In *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 48-50 (1974), this Court held that petitioner's pursuit of a grievance through arbitration under the collective bargaining agreement, resolved adversely to him, did not preclude a suit against his employer under Title VII. In discussing the origin and purposes of Title VII, the Court stated:

> "Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination . . .
>
> "Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to *supplement*, rather than *supplant*, existing laws and institutions relating to employment discrimination." *(emphasis added)*

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-462 (1975), the Court said:

> "Despite Title VII's range, . . . the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief."

absolute jurisdictional bar to invoking the statutory remedies, and limitations, built into Title VII.

The Opinion below does exactly what this Court has warned against in its decisions on the scope of Title VII. It holds that plaintiffs' employment discrimination remedies are necessarily defined by Title VII, whether the plaintiff has chosen to bring his suit under Title VII of the Civil Rights Act of 1964, §1981 of the Civil Rights Act of 1870, or §1983 of the Civil Rights Act of 1871 to vindicate a Constitutional or federal right. In so holding, the Court below has ignored this Court's repeated holdings that Title VII is only a *supplement to*, not a *replacement for*, the pre-existing remedies for employment discrimination.[31]

The Opinion held that the doctrine of *in pari materia* dictates §703(h)'s application here. The court reasoned that §703(h) of the Civil Rights Act of 1964, being a later and more specific statute, must control the earlier and more general provisions of §1981 and §1983. *NAACP v. DPOA*, 900 F.2d, @ 911-912. Petitioners believe this reasoning conflicts with the prior holdings of this Court. The doctrine of *in pari materia* applies only when two statutes conflict; it has no applicability where, as in this case, a mere statute collides with the Constitution.[32]

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[31] Supporting Petitioners' request for review is the recognition by the Court of Appeals that:

> "the Supreme Court has recognized that Congress did not, with the passage of the Civil Rights Act of 1964 and its 1972 Amendments, intend to repeal existing statutes in the civil rights field, or make Title VII the exclusive remedy in all employment discrimination contexts". *NAACP v. DPOA*, 900 F.2d, @ 913 . . . .
>
> "the Supreme Court has yet to address directly the relationship between §703(h) and the earlier Civil Rights Statutes"

Despite these disclaimers, the Court of Appeals proceeded to misapply the doctrine of *in pari materia* as its rationale for holding that Title VII strictures apply to 1981 claims even where no Title VII complaints were filed, and no Title VII claims were specifically pleaded below.

[32] The court of appeals Opinion simply ignores the fact that the violation here was a constitutional one, and that 42 U.S.C. §1983 is simply a procedural device by which plaintiffs may prosecute violations of the federal Constitution and statutes. As discussed *supra*, the actual violation

Thus, even though an Equal Protection Clause violation might be forced to take on the appearance of a statute because it is prosecuted pursuant to §1983, a federal court need not look to Title VII for enforcement power because the precedents of this Court have already provided it with such power. Equal Protection remedies are naturally broader than those of Title VII, which has a more limited role in the fight against invidious discrimination.

In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) the purpose of Title VII was held to be:

> "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."

To achieve this result, the Congress not only made *intentionally discriminatory employment conduct* a violation of Title VII, but it also proscribed *neutral employment practices with a discriminatory effect.*[33] §703(h) was added to make clear that not all seniority systems were violative of Title VII, under the rationale of *Griggs v. Duke Power*, §401 U.S. 424 (1971). The Equal Protection Clause, on the other hand, has the larger, more important goal of eradicating discrimination any time the state actor is purposefully discriminating on the basis, *inter alia*, of

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alleged by Petitioners and found by District Judge Gilmore was that the City had intentionally discriminated against its Black police officers, in violation of the Equal Protection Clause. As such, the Opinion at issue in this Petition erroneously applied principles of *in pari materia*. Furthermore, the doctrine of *in pari materia* is also inapplicable because there is no conflict between Equal Protection remedies and §703(h) of Title VII. This Court stated, with regard to specific statutes governing more general ones:

> "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 552 (1974)

[33] *Teamsters v. United States*, 431 U.S. 324, 350 (1977)

race.[34] The Equal Protection Clause is not limited to simply employment discrimination, while Title VII cannot be applied to any other form of discrimination.

The two provisions thus serve very different purposes. As a result of the heightened importance of eradicating intentional discrimination, once it has been found, the remedial scheme this Court devised for violations of the Equal Protection Clause is one of broad, flexible remedies, as discussed above. Because it deals only with intentional discrimination, the Equal Protection Clause has no need for the limitations placed on Title VII remedies. The remedies under both these provisions are perfectly capable of coexistence. As such, they are not subject to being read *in pari materia*.

III.

The Sixth Circuit's Opinion Raises Important Issues Re: 42 U.S.C. §1983 that Need Resolution by this Court

The court of appeals below held that a federal statute, §703(h) of Title VII, precludes a federal district court from imposing an Equal Protection remedy which the Supreme Court of the United States has held it not only has the power, but the duty, to impose. The decision raises issues of Supremacy and Constitutional rights which are of vital importance to other circuits as well as this Court.

In *Marbury v. Madison*, 1 Cranch 137 (1803), this Court established that the Constitution is the paramount law of the land, and that it is this Court's duty to interpret the Constitution. It follows that even a congressional enactment does not have the power to put constraints on this Court's constitutional remedies. The Opinion below, by holding that a constitutional claim being pursued by means of 42 U.S.C. §1983 is limited by §703(h), has attempted to affix just such constraints on the remedies this Court has fashioned for violations of the 14th Amendment's Equal Protection Clause.

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[34] *Washington v. Davis*, 626 U.S. 229 (1976).

In *Louisiana v. United States*, *supra*, this Court held that the district court had a duty to render a decree that would eliminate the effects of past discrimination as well as bar future discrimination. *Louisiana v. U.S.*, 380 U.S., @ 154. In *Missouri v. Jenkins*, 110 S. Ct. 1651, 109 L. Ed.2d 31, 58 U.S.L.W. 4480 (1990), this Court recently made clear that neither the district court's duty nor its power were suspended, either because its order to remedy constitutional violations might cause fiscal hardship, or because it might require the state to make payments contrary to state law and otherwise prohibited by the Tenth Amendment.[35]

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[35] In *Missouri v. Jenkins*, this Court rejected the argument that the district court order impermissibly ignored state laws which governed the amount and methods by which funds could be raised to meet otherwise valid obligations:

> "Here, the KCMSD may be ordered to levy taxes despite statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment. To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them. . . . '[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.' *North Carolina State Bd. of Education v. Swann*, 402 U.S. 43, 45 (1971)."

This Court also swept aside the state's argument that the 10th Amendment shielded it from having to make desegregation payments ordered by the district court:

> "The Tenth Amendment's reservation of nondelegated powers to the states is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment."

It seems obvious that, if neither state laws nor the Tenth Amendment are permitted to block a district court's remedial orders to repair constitutional violations in Kansas City, then the provisions of §703(h) cannot be distorted as below to effect a barrier to prevent the district court's remedial order from reaching the continuing vestiges of intentional, unconstitutional, racial discrimination in Detroit.

The Sixth Circuit's Opinion, by holding that a federal statute may control and shape the contours of a constitutional right, is an effort at rewriting the system of checks and balances set forth as early as *Marbury v. Madison, supra.*[36]

The Opinion below raises compelling issues regarding the interpretation of §703(h) of the Civil Rights Act of 1964. The Court below has given that Section a meaning that neither this Court nor Congress ever intended.

As stated in *Teamsters v. United States*, 431 U.S. 324, 344 (1977):

> "The unmistakable purpose of 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended

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[36] This Court has had previous reason to determine the breadth of its mandate to remedy Equal Protection violations when it seemingly conflicted with a federal statute. In *Drummond v. Acree*, 409 U.S. 1228 (1972), a district court order adopting a plan to desegregate 29 elementary schools in August was challenged as conflicting with §803 of the Education Amendments of 1972. This statute purported to postpone transportation of any student for the purpose of achieving racial balance, until all appeals had been exhausted. The Court found that, since the district court order to transport children was part of a proper plan to remedy 14th Amendment violations, citing *Swann, supra*, the statute must have meant to refer only to *de facto* segregation which did not violate the Equal Protection Clause:

> "The statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the 'transfer or transportation' of students 'for the purposes of achieving a racial balance among students with respect to race.' It does not purport to block all desegregation orders which require the transportation of students." *Drummond*, at 1230.

To reach that result, this Court reasoned that §803 could not be read to render meaningless the mandate in *Swann* whenever transportation was involved in the remedy.

Similarly, the federal statute in this case, §703(h), cannot be read to render meaningless the affirmative duty to eliminate intentional employment discrimination whenever the prevention of layoffs is involved.

> result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes."

The "unmistakable purpose" has been reiterated by this Court on several later occasions, when plaintiffs complained that Title VII violations should be remedied by methods abridging seniority rights.[37] As the Sixth Circuit points out, §703(h) has also been applied to protect seniority systems where the underlying violation was brought under 1981. However, this is still a federal *statutory* right, as distinguished from a *constitutional* right. The cases hold only that employers need not go so far as to abrogate a valid seniority system in order to comply with Title VII.

The Opinion below distorts this line of cases, asserting that §703(h) of Title VII has established "an exception to liability for employment discrimination based on race." *NAACP v. DPOA*, 900 F.2d, @ 907. By applying this distorted notion, the Opinion interprets its "exception" as applying to constitutional violations as well as to other practices defined by statute as racially discriminatory. The court below has taken what Congress and this Court created as a *shield*, to protect seniority systems from being viewed as *per se* Title VII violations, and transmogrified it into a *sword*, which exempts from liability all job discrimination, even if intentional, so long as there is a seniority system in place. Yet, neither Congress nor this Court ever suggested, much less held, that §703(h) could immunize intentional racial discrimination in employment from constitutional remedy.

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[37] See, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), (Employer not required to abrogate seniority system of a collective bargaining agreement in order to remedy violation of 703(h)(1) of the Act); *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982), (Employer need not depart from seniority system to remedy seniority, promotion, and job classification practices which violated Title VII); and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 582-583, and fn 16 (1984) (No departure from seniority system required to comply with Title VII remedial order.)

IV.

The Opinion Below on Union Liability Conflicts In Principle with Applicable Rulings of this Court

District Court Findings On DPOA Liability

The district court's 1984 decision concluded that the DPOA had violated its Duty of Fair Representation. This conclusion was based on the DPOA's "failure to adequately represent the interests of its black members in the layoffs of 1979 and 1980."

Based on the full trial record before it, including the thousands of trial transcript pages and more than one dozen witnesses, the district court made extensive findings about the DPOA's racially discriminatory conduct. Stating that

> "The DPOA's breach of the duty of fair representation flows not merely from any reliance upon a seniority system, or a simple refusal to make concessions in the interests of minorities. The DPOA's liability is premised on more than this. . . ."

the district court found "A history of racial hostility and indifference to the rights and needs of black officers"; a "total absence of black representation in the leadership levels of the union"; "totally perfunctory and passive behavior of the union leadership" in the face of layoffs which would wipe out 50% of the DPOA's black membership; a "present day failure to make any serious efforts to assist these black officers"; and, "A history of concessions and prompt union action to avert layoffs in 1975 and 1981 when the jobs of white officers were at stake."

On this basis, the district court concluded that it was "only concerned with activity that is arbitrary, racially discriminatory, and not in good faith, and this court finds that, in its representation of its black members, the DPOA's perfunctory and passive behavior in 1979 and 1980 breached the duty of fair representation."[38]

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[38] *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984).

Having concluded that the DPOA had breached its Duty of Fair Representation, and that the scope of relief for that breach was essentially the same as would be available for violation of 42 U.S.C. 1981, the district court said that it had "no reason to consider the claim under 42 U.S.C. §1981, in light of the result reached here."[39]

In the first appeal, the court of appeals reversed the district court ruling on the Duty of Fair Representation, on the grounds that layoffs were not mandatory subjects of bargaining pursuant to *Local 1277, AFSCME v. City of Centerline*, 414 Mich. 642, 685, 327 NW 2d 822, 831 asserting that no liability could be found for DPOA failure to act on issues as to which it was not required to act in the first place.[40] Noting, however, that the district court had explicitly declined to rule on the claim under 42 U.S.C. §1981, the court of appeals remanded the matter with instructions that Plaintiffs be permitted to prosecute this claim. *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1988).

On remand, the district court, denied the DPOA's motion for summary judgment, *NAACP v. DPOA*, 676 F. Supp., @ 796-97, noting that:

> "[it is] impossible to fairly read this court's findings concerning the DPOA's history and conduct before, during, and after the 1979 and 1980 layoffs, without concluding that the DPOA was indeed guilty of intentional discrimination. . . ."

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[39] In its decision awarding fees to Plaintiffs, *NAACP v. DPOA*, 629 F. Supp. 1173, 1180 (E.D. Mich. 1985), the district court further addressed the nature of the claim against the DPOA when it said that:

> "The court did not reach plaintiff's claim under §1981 because that claim was mooted by the finding of the breach of the duty of fair representation. Plaintiffs' §1981 claim and duty of fair representation claim arose out of a common nucleus of operative facts, i.e., the DPOA's action as a whole with regard to the 1979 and 1980 layoffs of black officers."

[40] *NAACP v. DPOA*, 821 F.2d 328, 332 (6th Cir. 1987). The court also based its reversal on its conclusion that the district court had made no finding of improper motivation in the bargaining which produced the seniority provision of the collective bargaining agreement.

The court held that its findings "with respect to the violation of the Duty of Fair Representation were tantamount to a finding of intentional discrimination under 42 U.S.C. §1981 when it awarded attorneys fees and costs against the DPOA". *NAACP v. DPOA*, 676 F. Supp., @ 797.

On appeal of the mootness decision, the court agreed with Petitioners that the district court erred when it dismissed the case against the DPOA on mootness grounds:

> "First, the fact that the district court has accomplished the goals of its own injunctive order, later reversed as having no basis in law, does not render a case moot. Second, assuming for the moment that the plaintiffs had viable §1983 claims against the city or the union for the 1979-1980 layoffs, the appropriate remedy would require more than mere recall and retroactive seniority. It would include the determination of other benefits such as back pay and out of pocket costs incurred by the laid off police officers . . . Third, minority police officers' majority membership in the union does not 'without more' translate into the ability to protect themselves against discriminatory action by the leadership. Rather, their ability to protect themselves depends on factors such as the union's organizational structure and could not be evaluated in the abstract without further inquiry. In light of these factors including the Supreme Court's holding in *Stotts*, we conclude that the controversy was not moot." *NAACP v. DPOA*, 900 F.2d, @ 906.

The Opinion's Dismissal of the 1981 Claim Conflicts With This Court's Holding in Johnson v. Railway Express Agency

Just as it had concluded that the City was immunized from challenge via §1983 by operation of §703(h) of Title VII, the court of appeals held that the §1981 claim against the DPOA was barred by §703(h). *NAACP v. DPOA*, 900 F.2d, @ 912, fn. 10.

Petitioners' discussion of, and authorities cited concerning the inapplicability of the doctrine of *in pari materia* to Title VII/§1983 claims, applies equally to Title VII/§1981 claims. The court below claims support for its position from this Court and other Circuit Courts, mistakenly citing *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). However, as this Court found in *Johnson*, 424 U.S., @ 459-462, the Opinion below conflicts with Congressional intent, with respect to the ability of claims under Title VII to coexist with those brought under §1981.[41]

The Opinion below cited *Brown v. G.S.A*, 425 U.S. 820, 828 (1976), for the proposition that this Court has prevented "artful pleading to avoid both the requirements and consequences of a Title VII action by any other name." Even a cursory reading of *Brown v. G.S.A.*, however, underscores that it was inapposite to the case below, and miscited by the court to support its conclusions, when it more properly should be read to support the position of the Petitioners.[42] The Opinion below similarly misconstrues the holdings of this Court in *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 375-76

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[41] A reading of *Johnson*, reveals that it explicitly affirmed the separate nature of §1981 claims and those brought under Title VII. *Johnson* held that filing a Title VII charge does not toll the statute of limitations for claims brought under §1981.

[42] *Brown v. G.S.A.* addressed the question of whether federal employees were limited to Title VII as the vehicle for redressing claims of invidious employment discrimination. After analyzing the legislative history of the 1972 amendments to Title VII which extended coverage to federal employment, this Court concluded that, since there were no prior federal statutes providing such employment discrimination relief to federal employees, the Congress must have intended Title VII to be the exclusive remedy for federal employee claims of workplace discrimination. The Court specifically contrasts the situation faced by federal employees with that prevailing with respect to private employees and to other public employees. The Court found statutory remedies which pre-existed Title VII as to the non-federal employees, and specifically noted that the Congressional intent, when Title VII coverage was extended to these workers, was to *add* a new and independent basis to these pre-existing remedies.

(1979),[43] and of the 5th Circuit in *Watkins v. United Steel Workers*, 516 F.2d 41, 49-50 (5th Cir. 1975).[44]

The Opinion also wrongly notes, in footnote 10, that the Supreme Court's recent decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2263 (1989), would likely require dismissal of the case against the DPOA, asserting that the union conduct challenged below is "post-formation" conduct which *Patterson* said was not vulnerable to §1981.[45]

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[43] In *Novotny*, this Court held that §1985(3) may not be read to provide a substantive right, per se, but rather is a vehicle for addressing conspiracy to violate the substantive rights created by *other* statutes. In the instant case, however, the Court of Appeals below ignored the independent substantive rights which are created by §1981.

[44] In *Watkins*, the 5th Circuit held that where the fact and vestigial effects of past hiring discrimination had ceased for 10 years before the claim challenging a current layoff was brought, the employer could permissibly use a long-established seniority system for determining who would be laid off and/or rehired, without fear of violating either Title VII or §1981. This contrasts sharply with the instant case, in which the district court explicitly found that vestigial effects of the prior explicit racially discriminatory hiring had not yet been extirpated at the time of the layoffs here challenged. *Watkins* explicitly held that the failure of Title VII to "proscribe an employment practice does not foreclose an attack under 42 U.S.C. 1981", and specifically refused to make a finding as to whether or not §703(h) applied to 42 U.S.C. §1981, on the ground that the absence of discrimination made irrelevant any applicability §703(h) might otherwise have.

[45] The opinion below directly conflicts with this Court's decision in *Patterson*, with respect to union misconduct. *Patterson* is properly quoted for the proposition that:

> "racial harassment relating to conditions of employment is not actionable under §1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."

However, the Court of Appeals failed to note that *Patterson* also held:

> "It [the phrase about enforcing contracts] also covers wholly private efforts to impede access to the courts or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations,

The Duty of Fair Representation Claim

The Opinion's resolution of the Duty of Fair Representation issue provides an additional basis for granting the instant Petition for Certiorari.

In the original Duty of Fair Representation decision by this Court, *Steel v. L & N Railway*, 323 U.S. 192 (1944), the union was found liable for having permitted an employer to set up separate black and white bargaining units, with provisions requiring that any lay off would necessarily include blacks before any whites could be reached. While this Court has consistently affirmed the wide latitude unions have in deciding which complaints to grieve, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), this Court and other federal courts have not hesitated to hold liable union conduct which expediently sacrificed minority members in order to protect white members.[46]

Citing *Local 1277 AFSCME v. City of Centerline*, 414 Mich. 642, 665 (1982), the Opinion held that the DPOA could not legally be found liable for a failure of its Duty of Fair

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as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract. Following this principle and consistent with our holding in *Runyon* that 1981 applies to private conduct, we have held that certain private entities such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent members in disputes over the terms of binding obligations that run from the employer to the employee, are subject to liability under §1981 for racial discrimination in the enforcement of labor contracts. See, *Goodman v. Luckens Steel Co.*, 482 U.S. 656 (1987)."

Patterson, thus, rejected the notion that racially-motivated union misconduct is immunized from attack under §1981. *Goodman v. Luckens Steel, supra*, squarely contradicts the Court of Appeals reasoning below, holding that §1981 may properly be used to prosecute a racial discrimination claim against a union which ignored and failed to pursue adverse racial treatment by an employer.

[46] See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967); *Emmanuel v. Omaha Carpenters District Council*, 535 F.2d 420 (8th Cir. 1976); *Jennings v. American Postal Workers Union*, 672 F.2d 712 (8th Cir. 1982); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980); *Alvey v. General Electric*, 622 F.2d 1279 (7th Cir. 1980).

Representation, because an employer's decision to effect a lay off is a *permissive* subject of bargaining, under Michigan law. A reading of *Local 1277*, however, makes clear that the Opinion below misconstrued it as badly as it did the holdings of this Court discussed above. *Local 1277* stands for the proposition that, while the *initial* decision to lay off is not one over which the employer must bargain, the *impact* of any such layoff is a mandatory subject of bargaining.

The Michigan Supreme Court held in *Local 1277*, at p. 664, the *impact* of the layoff

> "on the safety of the remaining forces, seniority rights, 'bump' rights, and even the motive behind the layoff decisions are all subjects of the collective bargaining agreement. Thus, we do not foreclose bargaining or the issuance of an arbitration award covering such issues. We only hold that the initial decision is a management prerogative and that the arbitration panel cannot mandate a clause on the initial layoff decision."[47]

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[47] The Petitioners below challenged, precisely, the *impact* of the 1979 and 1980 layoffs, in light of the City's unmet remedial duties flowing from the prior intentional racial discrimination which violated the Equal Protection Clause of the 14th Amendment. It was the DPOA's racially-motivated refusal to take action to avert the racially-adverse *impact* of these layoffs which prompted Petitioners to allege a failure of the duty of fair representation. Petitioners never questioned that a decision to lay off Detroit employees, standing alone, was a management prerogative.

Petitioners contended that, in the face of an unmet duty to dismantle a previous dual system of public employment, the 1979 and 1980 lay off decisions *did not stand alone*, and that the *initial decision* to lay off was inseparable from the *impact* of that decision on the City's constitutional duty to remediate its prior racial discrimination.

The district court below found that, at a time the City defendants were prepared to bargain over the fact and impact of the 1979 and 1980 layoffs, the DPOA completely abandoned its duty to fairly represent the black members of the union by adamantly refusing to even consider bargaining on this issue, even though the DPOA had insisted on alternatives to layoffs in 1975 and 1981 when most of those who would have been laid off were white. It was such race-conscious DPOA behavior which led to the findings of intentional discrimination by the district court.

V.

Historic and Current Congressional Action Each Supports Granting the Petition

Also supporting Petitioners' request that the Writ be granted is the consistent Congressional statement that the civil rights statutes are to be given a broad construction in order to accomplish the national policy against discrimination they convey.[48] Accordingly, the Congress has acted on several occasions to overrule what were viewed as unduly restrictive readings by the federal courts.[49] As recently as the current session, both houses of the Congress have articulated remarkably similar language requiring that the federal civil rights statutes be given a liberal construction.[50]

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[48] See, e.g., the testimony of Representative Shallibarger supporting §1981's historical antecedent, the Civil Rights Act of 1871, *Congressional Globe*, 42d Congress, First Session, App. 68 (1871). Also see, *U.S. v. Price*, 383 U.S. 787, 801 (1966); *Jones v. Mayer*, 392 U.S. 409, 437 (1968); and *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

[49] See, e.g., the Pregnancy Discrimination Act of 1978, Public Law 95-555, which responded to *General Electric v. Gilbert*, 429 U.S. 125 (1976); the Voting Rights Act Amendments of 1982, P.L. 97-205, which responded to *City of Mobile v. Bolden*, 446 U.S. 55 (1980); the Handicapped Children Protection Act of 1985, P.L. 99-372, which responded to *Smith v. Robinson*, 468 U.S. 992 (1984); and the Civil Rights Restoration Act of 1988, P.L. 100-29, which responded to *Groves City College v. Bell*, 465 U.S. 555 (1984).

[50] See, e.g., Civil Rights Act of 1990, Senate Bill 2104, Sec. 11:

> "A. *Effectuation of Purpose:* all federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies"
>
> "B. *Non-limitation:* Except as expressly provided, no federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other federal law protecting such civil rights"....
>
> "The Act also codifies well established rules of construction reaffirming the intention of Congress that civil rights laws must be interpreted consistent with the intent of such laws and construed broadly to provide equal opportunity and effective remedies."

CONCLUSION

The Writ should be granted because the Opinion below conflicts with consistently stated Congressional intent, as well as with rulings by this Court on the Equal Protection Clause, Title VII, §1981, §1983, and intentional racial discrimination by unions.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

VS.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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September 17, 1990

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A-67	1/13/88	Opinion of district court denying DPOA motion for summary judgment, and denying City motion for entry of judgment NAACP v. DPOA, 676 F. Supp. 790 (E.D. Mich. 1988)
A-87	6/15/88	Opinion of district court finding the case moot as to both the City and DPOA NAACP v. DPOA, 685 F. Supp. 1004 (E.D. Mich. 1988)
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A-117	6/18/90	Court of Appeals Opinion denying rehearing (1 page Slip Opinion)

Opinion

N.A.A.C.P., Detroit Branch; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poelinitz; on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); David Watroba, President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and The Michigan Employment Relations Commission, Defendants.

Civ. A. No. 80-73693.

United States District Court,
E.D. Michigan, S.D.

July 25, 1984.

Black police officers of city of Detroit brought action against city, its mayor, its police department, police commissioner, police chief, and police officers association alleging city had violated affirmative duties imposed by prior findings of constitutional violations and that union had breached its duty of fair representation. The District Court, Gilmore, J., held that: (1) city breached its affirmative and constitutionally mandated duty to remedy past potential racial discrimination when it began its massive layoffs of black officers; (2) breach by city was knowing and intentional; and (3) union breached its duty of fair representation.

Order accordingly.

1. Civil Rights—9.10

Constitutional obligation of city to eliminate continuing effects of past racial discrimination continued to exist at time of massive layoffs of black police officers, where percentage of

blacks in ranks of police officers was 28.3%, in all ranks was 27.9%, and relevant labor market in city was over 65% black.

2. Civil Rights—9.10

City's breach of its affirmative constitutionally mandated duty to remedy past intentional racial discrimination in police department was willful, where city knew that it was under legal mandate to continue its affirmative obligation to black officers and knew that proposed massive layoff would have drastic effect upon its obligation.

3. Civil Rights—13.8(3)

Good faith is not a defense by municipality to a constitutional violation.

4. Civil Rights—13.10

Neither bona fide seniority clauses nor contractual obligations are a defense to Fourteenth Amendment violation in employment situation. U.S.C.A. Const. Amend. 14.

5. Civil Rights—13.16

State law cannot stand in way of full and complete remedies for constitutional violations.

6. Contracts—114

Parties cannot by contract limit their liability for preexisting constitutional violations.

7. Civil Rights—9.10

Where past intentional discrimination by city in hiring of black police officers had been found, city was liable every time it knowingly and foreseeably breached its affirmative obligations to remedy discrimination.

Opinion

8. Civil Rights—9.10

Labor Relations—219

City does not fulfill its obligation under Fourteenth Amendment, nor does union fulfill its obligations to fairly represent its members, by simply giving difficult problem of redressing racial injustice in society to federal courts.

9. Civil Rights—9.10

In addition to usual losses sustained with loss of employment, class of black police officers suffered injury of betrayal as direct result of city's past racial discrimination and its failure at time of massive layoffs of black police officers to continue to remedy discrimination, where black police officers' standing in community was put in jeopardy by their joining police force, and officers had to face inference that city was playing games with them and was not serious about its efforts to remedy past discrimination.

10. Civil Rights—9.10

Layoffs of approximately 1,100 police officers below rank of sergeant, of which approximately 75% were black, violated not only black officers' constitutional rights, but constitutional rights of black citizens of city.

11. Civil Rights—13.16

Race-conscious remedies are permitted to redress constitutional violations.

12. Civil Rights—13.16

Classwide relief to remedy past constitutional violations is permissible without individual members of class having to prove that they were actual victims of past discrimination.

13. Civil Rights—13.16

Race-conscious remedial relief must be both necessary and tailored to cure constitutional violations.

14. Civil Rights—13.16

Appropriate remedy for discriminatory layoff of black police officers by city was reinstatement of all black officers who remained on layoff status and who wished to return, with call back subject to normal procedures of police department pertaining to returning laid-off police officers, with all returned officers to be awarded seniority he or she would have had, if there had been no layoffs.

15. Civil Rights—13.2(1)

In addition to requiring call back of all black police officers laid off by city in massive reduction of police force, court also permanently enjoined city from laying off, suspending, or discharging, except for disciplinary reasons, any black or white police officer without prior approval of court.

16. Labor Relations—219

As exclusive bargaining representative for its members, police union had duty of fair representation under Michigan law.

17. Courts—97(1)

Under Michigan law, court must look to federal law for guidance in deciding whether union breached its duty of fair representation.

18. Labor Relations—219

Duty of fair representation by union is judicially created remedy.

19. Labor Relations—218

By allowing unions to be exclusive representatives of their members, and thus subsuming rights of minorities in collective bargaining, unions have not been granted licenses to practice racial discrimination in violation of either Fourteenth Amendment or equal protection clause of Michigan Constitution. U.S.C.A. Const.Amend. 14; M.C.L.A. Const.Art. 1, § 2.

20. Labor Relations—219

Exclusivity principle of National Labor Relations Act and Michigan labor relations statute is constitutional only if there is duty of fair representation, and that means representation of all members of union; this duty of fair representation is fundamental limitation upon union activity. M.C.L.A. § 423.211; National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

21. Labor Relations—219

Union's obligation under duty of fair representation is analogous to that of fiduciary to principal.

22. Labor Relations—218

Union has higher standard to its members than standard owed by employer to employee.

23. Labor Relations—219

Labor union has no per se obligation to make concessions or give up demands won at bargaining table and in court in order to fairly represent minority members.

24. Labor Relations—219

Police officers union was guilty of breach of its duty of fair representation through its failure to adequately represent interests of black members in layoffs from department, where history of racial hostility and indifference to rights and needs of black

officers existed, blacks were totally unrepresented in leadership levels of union, one-quarter of union membership, one-half of black membership, and loss of approximately $500,000 a year in dues resulted from layoffs, union failed to make any serious efforts to assist black officers, and union had in past acted to avert layoffs of white officers.

25. Labor Relations—769

Where union had breached its duty of fair representation in regard to minority members, and no union governing committee had any black or minority members, appropriate relief consisted of requiring that within 12 months all committees of union, especially grievance and finance committees, board of directors and executive boards, reasonably reflect racial composition of union.

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Walter S. Nussbaum, Mara Kalnins-Ghafari, Detroit, Mich., for defendants Detroit Police Officers Association, David Watroba, President of DPOA.

Frank W. Jackson, Asst. Corp. Counsel, Detroit, Mich., Daniel B. Edelman, Washington, D.C., Terri L. Hayles, Asst. Corp. Counsel, Detroit, Mich., for defendants City of Detroit, Mayor Coleman A. Young, Detroit Police Department Board of Police Commissioners, Chief William Hart.

OPINION

GILMORE, Judge.

Can the City of Detroit, knowing full well that by laying off a large number of black police officers it breached its affirmative obligations in violation of the Fourteenth Amendment, fail to return these officers to work? This is one issue presented in this case, and the answer is clearly no.

Did the Detroit Police Officers Association fail to take reasonable efforts to protect these black members in connection with the layoffs and thus breach its duty of fair representation to them? This is the second major issue presented here, and the answer is clearly yes.

I

The action was brought by the Detroit Branch of the NAACP, The Guardians, Inc., and ten named individual black police officers against the City of Detroit, its Mayor, its Police Department, its Police Commissioners, its Police Chief, the Detroit Police Officers Association (DPOA), and David Watroba, President of the DPOA. Early in the proceedings, the Court certified a class of all black police officers laid off in 1979 and 1980.[1]

Plaintiffs contend that the City violated affirmative duties imposed by prior findings of constitutional violations in *Baker v. Detroit*, 483 F.Supp. 930 (E.D.Mich.1979), *aff'd sub nom Bratton v. Detroit*, 704 F.2d 878 (6th Cir.), *modified* 712 F.2d 222 (6th Cir.1983), *cert. denied* — U.S. —, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). Plaintiffs also contend the City defendant violated 42 U.S.C. §§ 1981, 1983, and 1985(3), and that their Thirteenth Amendment rights were denied by the City.

Plaintiffs further claim the DPOA has breached its duty of fair representation under Michigan law, and has violated 42 U.S.C. §§ 1981, 1983 and 1985(3), and the Thirteenth Amendment.

Full trial of the matter began on May 23, 1984, and continued through 21 days and 2,612 pages of transcript.

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[1] The Governor of Michigan and the Michigan Employment Relations Commission were original defendants, but were dismissed on motion early in the case.

Opinion

At issue is the layoff of approximately 1,100 Detroit police officers below the ~~rank of~~ sergeant, approximately 75 percent of whom were black. As a result of a budgetary crisis, the City, in 1979, implemented large-scale layoffs of City employees, including police officers. On October 13, 1979, the City laid off 400 police officers, of whom 71 percent were black, and in 1980 an additional 690 police officers were laid off, 75 percent of whom were black. All officers were laid off pursuant to Article 10(e) of the collective bargaining agreement between the City and the DPOA that required seniority be strictly applied in the event of layoffs, with the result that those last hired were first to be laid off.

In *Baker, supra*, Judge Keith found that the City of Detroit had engaged in intentional racial discrimination in its police department, at least until 1968. *Baker* found, and testimony at trial also revealed, that the City of Detroit did not seriously begin its efforts to eliminate the effects of its past racial discrimination until the 1970's. On July 31, 1974 the City adopted an affirmative action program for its police department, involving hiring and promotions in the Detroit Police Department. This affirmative action program has been upheld by the Sixth Circuit in *Bratton, supra*, and *DPOA v. Young*, 608 F.2d 671 (6th Cir.1979), *cert. denied* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

The affirmative action program resulted in an accelerated hiring rate for blacks in the Detroit Police Department. In 1975, out of 393 appointments to the Detroit Police Department, 250, or 63 percent, were black. In 1976 there were no appointments. In 1977, out of 1,245 appointments, 949, or 76 percent, were black, and in 1978, the last year in which hiring has taken place in the Detroit Police Department, out of 227 appointments, 179, or 78 percent was black.

On December 31, 1978 blacks held 1,719 of 4,393 positions in the rank of police officer, or 39.1 percent, and 1,946 of the total of 5,630 positions in the department, or a total of 34.6

percent. This figure represents the highest percentage of blacks ever in the Detroit Police Department.[2] On February 23, 1984, when this Court issued its partial summary judgment ruling, the Detroit Police Department had a total sworn personnel of 3,762, of which 1,007, or 26 percent, were black. It had a total of 2,668 police officers, of whom 756, or 28 percent, were black. Thus, it is clear that the net effect of the layoffs in 1979 and 1980 was to wipe out most of the affirmative action recruiting that had brought large numbers of blacks onto the police force in 1977 and 1978.[3]

At trial, Dr. Mark Bendick, Jr.,[4] an economist, updated the statistical figures established by Allen Fechter in *Baker*.[5] These statistics, which show the disparity between the number of blacks in the Detroit Police Department and the numbers of blacks in the relevant labor market, can only be explained, according to

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[2] At least since 1966, when the DPOA was made exclusive bargaining representative, all sworn Detroit officers below the rank of sergeant have been members of the DPOA. Thus, statistics for officers below the rank of sergeant kept by the City of Detroit should also be applicable to the DPOA.

[3] On August 12, 1981, the Detroit Police Department recalled 100 officers, and during the period from April 12, 1982 through June 8, 1982 recalled an additional 171 officers. However, further layoffs took place on September 10, 1983, when 224 police officers were laid off. This effectively wiped out most of the recalls of 1981 and 1982.

On June 18, 1984, the Detroit Police Department recalled 135 police officers, of whom 111, or 82.2 percent, were black. Further recalls are anticipated by the Detroit Police Department once the present contract, which is in arbitration under Act 312, is determined.

[4] The Court will adopt Dr. Bendick's method of calculating the shortfall of blacks in the police officer ranks, and in all sworn positions at designated points in time, because his analysis is identical to the method used by Mr. Fechter in *Baker, supra*. It will disregard the testimony of Dr. Joe Darden, who was hired as an expert for the plaintiff, because his method of calculation was not identical to the method used by Fechter.

[5] The figures established by Mr. Fechter can be found at the chart in *Bratton, supra*, p. 894.

both Fechter and Bendick, by racial discrimination in hiring. Bendick, in updating Fechter's work, testified at trial that, if the Detroit Police Department had hired police officers in proportion to the black representation in the relevant labor pool from 1945 to 1978, the black representation at the police officer rank as of December 31, 1978 would have been approximately 47.7 percent, rather than 39.1 percent. His analysis also revealed that, as of April 30, 1980, the black representation at the police officer level would have been approximately 43.8 percent rather than the 28.3 percent. Dr. Bendick made a projection for 1988, and indicated that, if the Detroit Police Department had hired blacks in proportion to their labor market representation in all of the years from 1945 to 1978, the presence of black officers in 1988 would be 50.5 percent. As of 1984, blacks comprised 65 percent of the relevant labor market, and the City of Detroit is 67 percent black.

This description of the effects of racial discrimination on the Detroit Police Department, and the efforts of the City of Detroit to correct is past racial discrimination, cannot be traced without mentioning the police officers' unions. It is a matter of public record that both the Lieutenants and Sergeants Association in *Baker, supra,* and the DPOA in *DPOA v. Young, supra,* brought court challenges to the City's affirmative action plan. The public record, as well as testimony at this trial, indicates that, at least where affirmative action for blacks was concerned, the police unions, including the DPOA, were bitter opponents, of the City. Testimony at trail indicated that the DPOA opposed efforts by the City to hire increased numbers of blacks and opposed the City's residency requirement—that all personnel in the Detroit Police Department have their residency in the City of Detroit, a requirement whieh, although not directly racial, has clear racial implications given the racial composition of the City of Detroit.

The first collective bargaining agreement between the DPOA and the City of Detroit was entered into in 1967. A seniority clause was bargained in at that time, and this clause has remained in effect in all agreements since. Several contracts

have been entered into since then, but the parties were unable to agree to a contract in 1977, and in 1978 the impasse was referred to arbitration under Public Act 312 of 1969, M.C.L.A § 423.231 et seq.[6] On December 30, 1978, the Act 312 Arbitration Board made its award on economic proposals. This award was challenged by the City in the courts, and was finally affirmed by the Michigan Supreme Court on June 6, 1980. *City of Detroit v. DPOA*, 408 Mich. 410, 294 N.W.2d 68 (1980).

The 1978 Act 312 award plays an important role in the underlying factual scenario of this case. The City of Detroit contended that this award was excessive and was the direct cause of the layoffs. The number of officers laid off was also linked monetarily to the amount of the increased award. The testimony at trial also revealed that the City took a gamble with its court challenges to the award. It did not set aside any monies in its budgets to pay for the award. Thus, when the Michigan Supreme Court, affirmed the award, the City owed a very sizeable lump sum.

From the DPOA's point of view, its attitude during this period was understandably colored by the fact that as of June 1980, when the Michigan Supreme Court rendered its decision, it had still not received the monies due on a 1977 contract, based on a December 1978 award. By 1980, DPOA members were due a considerable sum of retroactive backpay and retroactive COLA.

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[6] Act 312 provides that upon certification that the parties are unable to agree upon all issues in a contract in the public sector, those issues upon which they cannot agree will be submitted to arbitration by an impartial arbitration board, which renders a binding decision. The obvious purpose of this legislation is to avoid strikes in the public sector. The most controversial portion of the Act 312 procedure is its imposition of a mandatory "last-best offer" decision upon the arbitrators. M.C.L.A. § 423.238. The arbitrators have no discretion in this regard and must accept one of the parties "last-best offers." The parties present contract, which expired in 1983, is presently in Act 312 arbitration. The threat of this impending award colors the parties' position to this very day.

Opinion

II

On February 22, 1984, this Court held that the City of Detroit violated the equal protection clause of the Fourteenth Amendment when it laid off the plaintiff class of black police officers. The court entered a partial summary judgment for plaintiffs, holding:

1. That, based on the findings of intentional discrimination in *Baker v. City of Detroit*, 483 F.Supp. 980 (E.D.Mich.1979), *aff'd sub nom Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.), *modified* at 712 F.2d 222 (6th Cir.1983), *cert. denied*—U.S.—, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), the City had a constitutionally imposed continuing affirmative obligation not only to stop the discrimination but to remedy all of the effects of the discrimination.

2. That the City had not yet remedied the effects of this prior discrimination when, in 1979 and 1980, it reduced black representation on the police force.

3. That by these layoffs, which the City knew full well would reduce black representation on the police force, the City breached its affirmative obligation to the plaintiffs in violation of their rights under the Fourteenth Amendment.

This ruling was predicated upon the findings of intentional past discrimination against blacks in the Detroit Police Department made by Judge Keith in *Baker, supra.* In *NAACP v. Detroit Police Officers Association*, 525 F.Supp. 1215 (E.D.Mich. 1981), this Court previously held in this case that the doctrine of collateral estoppel precluded relitigation of the issue of the City's past intentional discrimination, as found in *Baker*.

Bratton and *Baker* found that, at least until 1968, the City of Detroit "employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations." *Bratton, supra*, at 888. Since the *Baker—Bratton* decisions were in the context of suits by white officers challenging the City's

voluntary affirmative action plan, neither Judge Keith nor the Sixth Circuit had to reach the obvious corollary of these findings—that this consistent policy of intentional discrimination was in violation of the Fourteenth Amendment, which prohibits all invidious racial discrimination, *See Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed2d 1010 (1967). The record in *Baker* is "replete with evidence", *Bratton, supra*, at 888, of invidious racial discrimination against blacks in the Detroit Police Department prior to 1968.

In 1967, at a time when the City of Detroit was 40 percent black, the Detroit Police Department was only 6 percent black. Prior to that time, the Detroit Police Department had been a segregated department where blacks were assigned to patrol exclusively black areas, scout cars were segregated, and nearly every phase of the operation of the Police Department, from patrols to investigations to supervisory functions, was segregated. Perhaps even worse than the discrimination against blacks in the Detroit Police Department itself was the effect of this discrimination upon relations between the police and the black community. This relationship has been characterized by all observers as one of deep hostility, and the race riots that occurred in this City in 1943 and 1967 have been directly tied to the hostility between the police and the community, a direct result of invidious racial discrimination in the Detroit Police Department.

Testimony introduced at trial in this case also confirmed the history of intentional race discrimination against blacks. Chief William Hart, who is black and who joined the Department in 1952 and eventually rose through the ranks to become Chief in 1976, testified about this past discrimination, as did Executive Deputy Chief James Bannon, who is white and who joined the Department in 1949.

Furthermore, Dr. Mark Bendick, Jr., the economist who updated the *Fechter* analysis from *Baker*, also testified that the statistical shortfalls of blacks in the Detroit Police Department

over the years, up to the early '70s, could only be explained as the result of racial discrimination.

In *DPOA v. Young, supra,* a case in which white patrolmen and the DPOA challenged the City of Detroit's voluntary affirmative action plan mandating a 50/50 black-white ratio in promotions of patrolmen to sergeants the court delineated the constitutional obligation here. "[T]he Constitution imposes on states a duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Id.* at 691. In addition to the foregoing holding, the court held that "[I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for 'it is enough that each recipient is within a general class of persons likely to have been victims of discrimination.' " *Id.* at 694.

Based on these judicial findings of past discrimination it is clear the City had an affirmative obligation to eliminate the continuing effects of past racial discrimination, and to eliminate all racial discrimination "root and branch." *Green v. County School Board,* 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1967). *See also Swann v. Charlotte-Mecklenburg,* 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971); *Keyes v. School District No. 1,* 413 U.S. 189, 200 n. 11, 93 S.Ct. 2686, 2693 n. 11, 37 L.Ed.2d 548 (1973). The City had notice of all of these judicial findings as of October 1, 1979 when Judge Keith's opinion in *Baker* was issued.

[1] Thus, in 1979, when the first of the massive layoffs of black officers involved in this case took place, the constitutional obligation of the City to eliminate continuing effects of past racial discrimination continued to exist. Although the City, through its voluntary affirmative action plan, had made great strides towards satisfying its constitutional remedial obligation prior to 1979, the obligation nonetheless remained in force in 1979. Although in 1978, the year before the layoffs involved in this case took place, 39 percent of Detroit police officers were black, the highest percentage ever, blacks still were 62.2 percent

of the relevant labor market. The 1978 figure of 39 percent blacks still represented a 6.6 percent shortfall of what the percentage of blacks would have been absent racial discrimination, according to testimony of Dr. Bendick. Given the percentage of blacks in the Detroit labor market in 1978, this figure is a conservative one in terms of what percentage would have been constitutionally mandated. *See Bratton,* as modified on rehearing, 712 F.2d 222, 223 (6th Cir.1983).

It is clear that the layoffs in 1979 and 1980 had a devastating effect upon the City's affirmative action plan. The present percentage of black representation in the ranks of police officers is 28.3 percent, and in all ranks 27.9 percent. The relevant labor market in the City of Detroit today is well over 65 percent.

The City thus breached its affirmative constitutionally mandated duty to remedy past intentional racial discrimination in the Police Department when it began its massive layoffs of black officers in 1979 and 1980, and this breach was knowing and intentional. "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make these actions any less 'intentional.' " *Keyes, supra* 413 U.S. at p. 210-211, 93 S.Ct. at p. 2698-2699.

[2] The September 3 letter of Mayor Young to David Watroba, plaintiff's Exhibit 1, shows that the City knew that it was under a legal mandate to continue its affirmative obligation to plaintiffs, and knew that the layoffs would have a drastic effect upon this obligation. Mayor Young wrote:

> In closing, let me remind you that affirmative action as a concept is not negotiable. It is mandated not only by the City Charter, but also by state and federal law and the Courts as well.
>
> It is also my opinion that the duty to implement affirmative action does not stop just because we have found more

equitable ways to hire new police officers. Rather, we have a double duty—and we are now challenged to find equitable ways to implement the September 5 layoffs.

The fact that we have found ways to remove hiring barriers at the front door does not relieve us to of our obligation to find ways to remove comparable barriers at the back door, now that the circumstances require it.

[3-6] The City argues that the law at the time was unclear on this subject, especially in relationship to the City's contractual obligation to the DPOA with reference to seniority rights. It is well established that good faith is not a defense by a municipality to a constitutional violation. *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Further, the Fourteenth Amendment provides no mention of bona fide seniority clauses nor contractual obligations as a defense. Nor can state laws stand in the way of full and complete remedies for constitutional violations. *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974). *See also Bakke*, 438 U.S. 265, at 307, 98 S.Ct. 2733 at 2757, 57 L.Ed.2d 750, (race-conscious action to remedy past discrimination is permissible, if based upon prior judicial, legislative or administrative findings of constitutional statutory violations.) (Powell, J.). Nor can parties by contract limit their liability for pre-existing constitutional violations.[7] This law was clearly established at the time the City began its unconstitutional course of action in laying off massive numbers of black police officers.

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[7] The City argues that in 1979 it was subject to conflicting legal obligations—its constitutional ones towards black officers and contractual obligations towards white officers. The City never sought declaratory relief from this or any other court. It cites no authority, nor could it, for the proposition that constitutional remedies can be frustrated by contractual obligations. Its citation of *W.R. Grace v. Local 759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), for the proposition that it would have been subject to double liability to white officers had it taken steps to protect black officers is inapposite. *W.R. Grace* involved a conciliation agreement under Title VII, with no constitutional issues involved, nor previous judicial findings of past racial discrimination.

[7] In its motion for reconsideration of this Court's order of partial summary judgement, the City objects to the finding of intentional discrimination at the time the City began its layoffs in 1979, and attempts to attach particular significance to general definitions of intent in the racial discrimination field, which hold that foreseeable results and discriminatory impact, *without more*, do not establish discriminatory purpose. *See e.g. Columbus Board of Education v. Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1975), *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). This is not the situation here. Here we have the "more"—the judicial findings of past intentional discrimination made by Judge Keith in *Baker*, and affirmed by the Sixth Circuit in *Bratton*.

Given this past finding of intentional discrimination, the City becomes liable every time it knowingly and foreseeably breaches its affirmative obligations to remedy this discrimination. The remoteness in time from the original act of intentional discrimination does not make later acts any less intentional. *Keyes, supra.* "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education v. Penick, supra* 443 U.S. at 459, 99 S.Ct. at 2947. Thus, the City's discussion of the particular intent of the City in 1979-80 is largely irrelevant. "[T]he measure of the post *Brown* I conduct of the school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." (Citations omitted). *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979).

This court does not ascribe racially discriminatory animus to Mayor Young and his administration. It is obvious that he has led the attempts of the City to remedy past discrimination against blacks in the Police Department, attempts which have placed the City of Detroit in the forefront of major metropolitan areas in this regard.

However, it is equally obvious from the testimony and exhibits that in 1979, and more particularly in 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than face a lawsuit by white police officers.[8] It also decided it would threaten layoffs of black officers as a club against the DPOA in an attempt to roll back the 1978 Act 312 arbitration award, especially the retroactive pay and COLA increases ordered in that award.

It is not the function of this Court to inquire into the political wisdom of these decisions. However, the Constitution, and particularly the Fourteenth Amendment, exists precisely to insure that the individual and group rights of all citizens, especially minorities who have been historically shut out of the political process, are protected in the political process.

[8] The rights of the black police officers and black citizens of Detroit to a fully integrated police force were sacrificed in the 1979 and 1980 layoffs. A city does not fulfill its obligations under the Fourteenth Amendment, nor does a union fulfill its obligations to fairly represent its members, by simply giving the difficult problem of redressing racial injustice in our society to the federal courts.

During the trial of this case, the United States Supreme Court issued its opinion in *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). This case has initiated a far-reaching debate over its implications for affirmative action and civil rights in general, but this Court need not address this debate since *Stotts* is not controlling here.

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[8] This, the City concedes: "... they (the city defendants) clearly would have preferred to depart from seniority based layoffs, yet chose not to because they believed that a court would be more likely to award back pay to prevailing white plaintiffs than it would to prevailing black plaintiffs."

Brief of City of Detroit on City's motion for Partial Summary Judgment, page 2.

Stotts involved Title VII.[9] This case involves liability under the Fourteenth Amendment. Title VII contains a clause specifically exempting bona fide seniority systems from attack.[10] The Fourteenth Amendment contains no such restrictions. *Stotts* and the Title VII cases relied upon by the Supreme Court there rest on interpretations of Congressional intent in enacting Title VII, and contain no interpretation of the Fourteenth Amendment.

In addition, *Stotts* involved a consent decree that specifically disclaimed liability for past discrimination. This case involves prior judicial determinations of past intentional discrimination.

The majority opinion in *Stotts* itself indicates it is distinguishable from a case where there has been a finding of past intentional discrimination: "Neither does it suffice to rely on the District Court's remedial authority under Sections 1981 and 1983. Under these sections, relief is authorized only when there is proof or admission of intentional discrimination . . . . Neither precondition was satisfied here." *Id.* —U.S. at —— n. 16, 104 S.Ct. at 2590 n. 16.[11]

This view of *Stotts* is confirmed by the recent denial of certiorari in *Buffalo Teachers Federation v. Arthur, cert. denied* — U.S. —, 104 S.Ct. 3555, 82 L.Ed.2d 856 (1984). The Second Circuit's opinion below in *Arthur v. Nyquist*, 712 F.2d 816 (2d

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[9] 42 U.S.C. § 2000e et seq.

[10] Sec. 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

[11] The Court does not accept the City's position advanced in post-trial argument that Title VII law regarding bona fide seniority systems is controlling in constitutional litigation. The cases cited by the City, *Chance v. Board of Education*, 534 F.2d 993 (2d Cir.1976); *Schaefer v. Tannian*, 538 F.2d 1234 (6th Cir.1976); *Stokes v. New York St. Dept. of Correctional Servs.* 369 F.Supp. 918 (S.D.N.Y.1982); and *General Building Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) simply do not stand for this proposition, and until the U.S. Supreme Court declares otherwise, this Court will not write "bona fide seniority system" into the U.S. Constitution, as the City invites it to do.

Cir.1983), involved the affirmance of a district court order that overrode the seniority system involving teachers in the Buffalo Public School System. This order was based on prior findings of intentional discrimination by the Buffalo school system, including the hiring of teachers.

The Second Circuit specifically held that the Title VII cases, which were the basis for the holding in *Stotts*, particularly *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which protect bona fide seniority systems, are not applicable in cases seeking remedies for constitutional violations based on judicial findings of intentional racial discrimination:

> Nor was the District Court's authority impaired, as the Federation contends, by the Supreme Court's decisions in *American Tobacco Co. v. Patterson*, 456 U.S. 63 [102 S.Ct. 1534, 71 L.Ed.2d 748] (1982), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 [97 S.Ct. 1843, 52 L.Ed.2d 396] (1977). In those Title VII cases, the Supreme Court ruled that bona fide seniority systems must be honored, unless there has been a finding of actual intent to discriminate . . . Here, however, the suit was brought to remedy violations of the Constitution rather than Title VII, and the District Court made a finding of intentional discrimination in the Board's maintenance of a segregated school system. We therefore agree with the District Court that it had the authority to curtail the seniority rights of the Federation's membership in order to vindicate the constitutional rights of the minority children in the Buffalo school system . . . . Once a local board of education has been found to have employed staff hiring practices that contribute to a racially segregated school system, the District Court has the power to remedy those practices and to override seniority systems that perpetuate those practices.

Id. at 822.[12] *See also Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir.1983), which reaffirmed this general principle, but held that the court-ordered remedy in the particular case was improper.

In general, no precedential effect should be given to a denial of certiorari. However, this Court can only conclude that, in light of footnote 16 in *Stotts, supra*, and the denial of certiorari in *Arthur* only two weeks after *Stotts*, *Stotts* presents no authority for changing this Court's determination of liability against the City of Detroit.

Therefore, this court reaffirms its determination that the City breached its affirmative obligations to the plaintiffs in violation of their Fourteenth Amendment rights.[13]

III

"[T]he nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738, 94 S.Ct. 3112, 3124, 41 L.Ed.2d 1069 (1974), (Milliken I); *Hills v. Gautreaux*, 425 U.S. 284, 293-94, 96 S.Ct. 1538, 1544-45, 47 L.Ed.2d 792 (1974). Having established the liability of the City under the Fourteenth Amendment, it now becomes necessary to delineate

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[12] The City's attempt to distinguish this case, as well as a similar case, *Morgan v. O'Bryant*, 671 F.2d 23 (lst Cir.1982), *cert. denied*, 459 U.S. 827, 103 S.Ct. 62, 74 L.Ed.2d 64, on the grounds they involved the vindication of the rights of students, not teachers, is not persuasive. Both cases involved findings of past intentional discrimination in hiring, as does this case. It is hard to fathom how the City can read these cases to stand for the proposition that it owes no constitutional duty to its black police officers. They stand for precisely the contrary.

[13] In addition to its Fourteenth Amendment claim, plaintiffs assert claims under the Thirteenth Amendment, 42 U.S.C. §§ 1981 and 1985(3). Given this Court's holding regarding the Fourteenth Amendment liability of the City, it is unnecessary to reach the Thirteenth Amendment and § 1981 claims. There has been no showing sufficient to sustain a finding of conspiracy liability under 42 U.S.C. § 1985(3). The evidence shows that the City and the DPOA have agreed upon virtually nothing since 1966.

the nature of the wrong, and the relief to be ordered against the City.

For the class of laid-off black officers there is obviously the loss of their jobs, which resulted from these unconstitutional acts, as well as the loss of back pay and other fringe benefits. William Bracey, former Chief of Patrol of the New York City Police Department, a very informative and credible witness, who, in 36 years, rose from the ranks of patrolman to become the highest ranking black officer in the New York Police Department, testified dramatically to this point.

He described the traumatic effect of layoffs on newly-hired black officers, stressing that when black officers are laid off after only serving briefly they have an added burden that white officers do not have. Because of the past racial animosity to the police, they often are alienated from friends and families, and are likely to have less support from them when they are laid off after just recently being hired. Often all of the distrust engendered by years of segregation surfaces again, and the officer, his friends and family think, "They're playing games with you. They really didn't want you in the first place."

Chief Bracey testified that this trauma is even more acute for rookie officers, and that the normal adjustment to becoming a police officer is difficult enough without the newly-hired black officer having the additional trauma of getting a message from the City that it is not serious about remedying the past discrimination in the Department.

[9] Thus, based on this testimony, the Court finds that in addition to the usual losses sustained with the loss of employment, the class of black officers suffered injury as a direct result of the City's past racial discrimination, and its failure in 1979 and 1980 to continue to remedy this discrimination. To put it bluntly—they suffered the trauma of betrayal. After placing their standing in the community in jeopardy by joining the police force, they had to now face the inference that the City was "playing games" with them, and was not serious about its efforts

to remedy this past discrimination. This trauma was directly tied to the City's constitutional violation.

[10] Without minimizing the losses suffered by the black officers, testimony at trial revealed a constitutional violation of even greater magnitude—the harm to the black citizens of the City of Detroit. Perhaps even more than the individual officers, they are the victims in this case.

When we deal with the police in an employment situation, we are not dealing with a private employer. The police function "fulfills a most fundamental obligation of government to its constituency," *Foley v. Connelie*, 435 U.S. 291, 297, 98 S.Ct. 1067, 1071, 55 L.Ed.2d 287 (1978). *Baker*, *Bratton*, and *DPOA v. Young* have affirmatively recognized what is known as the "operational needs" defense for affirmative action in the Detroit Police Department—that the presence of black officers on the police force is vital in enabling the police to effectively fulfill its police function. *See also Van Aken v. Young*, 541 F.Supp. 448 (E.D. Mich.1982).

In *DPOA v. Young, supra*, the Court held:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception on law enforcement officials and institutions.

608 F.2d at 696.

Baker and *DPOA v. Young* developed the operational needs theory in terms of legal justification for affirmative action. The testimony in this trial persuasively developed the converse—the harm to the black citizens in Detroit when the City retreated

from its commitment to affirmative action and a police force that met the needs of its community.

The testimony of Chief Bracey, Patrick Murphy, former Detroit and New York City Police Commissioner and currently president of the Police Foundation, Chief Hart, Deputy Chief Bannon, and Mayor Young developed the operational needs concept. Former Commissioner Murphy testified that the presence of black officers is vital to the whole concept of democratic policing, and that police should come from the people they serve. He emphasized the way black officers can educate white officers on the mores, folkways and language of the black community. He stated that it is absolutely necessary that the community be involved in policing, and to accomplish that, police officers must be representative of the community. He testified that there has been great improvement in police-community relations over the last 15 years, and that this has been largely due to the existence of more minorities on police forces. This evidence is overwhelming, and largely unrebutted. No one today could seriously hold the DPOA's position that a white police force living in the suburbs could effectively police the City of Detroit.

Mayor Coleman Young pointed out that formerly there was great alienation between the black community and the police department which resulted in ineffective law enforcement and poor community relations. This was changed in recent years. The Mayor also pointed out that the DPOA has exerted great influence in past administrations, and has regularly resisted efforts to hire more blacks. He testified that no officer of the DPOA has ever protested racial discrimination in the Detroit Police Department, or complained to him on behalf of any of its black members.

Chief Hart and Deputy Chief Bannon also testified forcefully on this subject. They said that, prior to 1974 when the City first seriously began to eliminate racial segregation in the Detroit Police Department, the Department was viewed as an occupation army by the black citizens of Detroit. This, they said, reduced

the effectiveness of the police in that they could not get witnesses to testify or cooperate in solving crimes, controlling crowds, or in crime prevention.

Both testified concerning changes that have taken place since citizens began to see that the City was serious about making the police more representative of the citizenry. There is a greater degree of police-citizen cooperation, crowd control is more easily handled, and crime prevention projects have increased dramatically. Furthermore, police fatalities have been drastically reduced. All of this is tied to the presence of sufficient numbers of blacks on the Detroit Police Department.

Chief William Hart has been chief since 1976. He has a doctorate from Wayne State University, and is a career police officer, having entered the Detroit Police Force in 1952.

Chief Hart outlined the history and background of the relationship between the police and the community in the 1950s and the 1960s, pointing out that at that time relations were very bad, and that the police, predominately white, was considered an army of occupation. He testified that when he first went on the force only three precincts had black officers, and that the department was totally segregated. Poignantly, he testified that he could not be assigned to a clean-up squad (a local vice squad in the precinct) until he could find a sergeant who would have a black on his team.

Chief Hart testified that the lack of trust in the police department prior to the '70s made it very difficult to properly police the City. He testified that after 1974 police-community relations changed dramatically, and he says now the people in the neighborhoods are part of the solution rather than part of the problem. Violence has been greatly reduced against police officers because of integration, and the rate of police killings has been greatly reduced. Police brutality against citizens has been greatly reduced and is almost nil at the present time.

Finally, Chief Hart pointed out that, with the layoff of the large numbers of black officers, the forward strides have been put on hold. The layoff of blacks has hampered the ability to fight narcotics, to do undercover work, to do surveillance work, and to work with organized crime and vice. Although there is a residue of good will in the community resulting from the increased black representation on the force, such good will cannot last forever. He wants all of the officers, black and white, called back.

Executive Deputy Chief James Bannon, of the Detroit Police Department, is a white, career police officer, who has been on the force since 1949. He holds a Ph.D. degree. He also testified that there is presently mutual support between the community and the Police Department, and reiterated Chief Hart's testimony that formerly the Police Department was an occupation force in the black community. The changes in attitude that have come about as the result of the number of blacks coming onto the force has been dramatic. Several factors brought about this change in the community and in the force, according to Chief Bannon:

1. A black Mayor and a black Police Chief have given people a feeling of accessibility;

2. Blacks are in policy positions in the Department for the first time;

3. The high visibility of black officers in the community has been significant in changing the community's attitudes.

The testimony of all police officials was that, as the result of the increase in black representation on the police force, the community relations with the police force had dramatically improved since 1974, and there has been a complete reversal in community attitude towards the force. They all testified, however, that the good will developed by the Detroit Police Department since 1974 is not inexhaustable, and can be used up if the community begins to see the return to the past days of racial segregation in the Detroit Police Department. Although the presence of many black command officers, who were unaffected

by the layoffs, somewhat ameliorates this problem, it is undisputed that black patrol officers are the most visible, have the most daily contacts with the community, and are most important in crime prevention and community relations. Therefore, massive reductions in the numbers of black police officers below the rank of sergeant on the street will have dramatic effects.

Just as significant as the testimony were the exhibits showing the effect of these layoffs on the actual operations of the Detroit Police Department. A particularly significant exhibit was Exhibit 645, which shows the racial composition of the Detroit Police Department by sections and precincts. The Special Events Unit, a highly visible unit charged with crowd control during major events, has been reduced from 28 percent black prior to the 1979 layoffs to presently six percent black. Precinct No. 5, which in September 1977 had a population that was 63.1 percent black, today has 18 percent blacks on patrol. Precinct No. 15, a predominently white precinct, which, prior to the layoffs, had 33 percent blacks on patrol, today has four percent blacks. Only six black officers, divided among three shifts, are now assigned to this precinct. This statistic parallels the worst days of segregation in the police department.

Finally, Exhibit 645 shows that the Youth Bureau, in a city where 80 percent of the youth is black, is only 13 percent black. Given the importance of black officers as role models for the youth and the importance of preventing youth crime, this statistic is a striking demonstration of the effect of this constitutional violation.

Thus, the City is in real danger of seeing the gains of the 1970's in terms of police-community cooperation reversed, if the City's unconstitutional layoffs are not remedied.

It is clear from the testimony of Mayor Young and the police experts, Bracey, Hart, Bannon, Murphy, and the exhibits, that the return of black officers to the streets of the City of Detroit is not only necessary to vindicate the constitutional rights of the black police officers, but is also an absolute necessity to restore

balance to the community, and the confidence of the community in the Detroit Police Department. Their testimony was intelligent, credible and convincing, and clearly established the need for the return to the force of the black police officers.

Thus, there are two constitutional violations which must be remedied—the harm resulting from the City's abandonment of its black officers, and the harm to the black community if the police force is returned to the days of racial segregation.

[11, 12] It is well established by now that race-conscious remedies are permitted to redress constitutional violations, *Bakke, supra*, 438 U.S. at 307, 98 S.Ct at 2757; *Bratton, supra*, at 882; *DPOA v. Young, supra*, and *Oliver v. Kalamazoo, supra*. Class-wide relief to remedy past constitutional violations is equally permissible without the individual members of the class having to prove that they were actual victims of past discrimination. "[I]t was error to require proof that the persons receiving the preferential treatment had been individually subjected to discrimination, for 'it is enough that each recipient is within a general class of persons likely to have been victims of discrimination.' " *DPOA v. Young, supra*, at 694, citing *Bakke*.[14]

[13] Although race-conscious remedial relief is permissible, the remedy must be "necessary" and "tailored" to cure the constitutional violations. *Oliver, supra*, at 764. A similar standard was established by Justice Powell in *Bakke:* "When they [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke, supra*, 438 U.S. at 299, 98 S.Ct. at 2753. And it is clear that this Court is mandated to "balance individual and collective interests." *Swann v. Charlotte-Mecklenburg, supra* 402 U.S. at 16, 91 S.Ct. at 1276.

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[14] For the reasons set forth, *supra*, pp. 1202-1204, *Storts* does not affect this holding of the Sixth Circuit.

Opinion

Based upon the findings of liability and the findings of the nature of the constitutional violation, this Court will order the following relief to cure the constitutional violation:

[14] The first relief to be ordered is the reinstatement of all black officers laid off in 1979 and 1980 who currently remain on layoff status, and who wish to return.[15] This should be done in an orderly manner and over a period of time, so that the City will have an opportunity to make the budget adjustments necessary to effectuate the return of these officers.

Therefore, the Court will order that all these officers be called back within 180 days of this opinion. Seniority will control in determining the order of callback. Within 30 days of the date of this opinion, the City shall present to the Court a plan to accomplish this.

All callbacks will be subject to the normal procedures of the Police Department—that is, the Department must determine if each officer desiring to return to duty is still qualified to be a Detroit police officer. If he or she is not, but can become qualified through additional training, such training shall be provided. In short, the Department may be subject officers desiring to return to duty to the normal procedures employed by them for all returning laid-off police officers.

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[15] As discussed earlier, this Court rejects the City's argument that the distinctions made in *Arthur v. Nyquist, supra*, and *Morgan v. O'Bryant, supra*, between harm to the public and harm to individual employees, prevent this Court from ordering the recall of the plaintiff officers. The constitutional mandate of this Court is that the remedy must be related to the "*condition* alleged to offend the Constitution . . . ." *Milliken v. Bradley*, 433 U.S. 267 at 280, 97 S.Ct. 2749 at 2757, 53 L.Ed.2d 745. This is what the recall of these officers is designed to do. The City argues against the recall of the officers, and yet asks this Court to order affirmative action recalls and layoffs at will of the City, intervention in the City-DPOA Act 312 proceedings, and a wage freeze (City Trial Brief, p. 49). This argument is self-serving and based on *Byzantine* legal distinctions which this Court rejects.

Moreover, all officers returned under this order shall be awarded the seniority he or she would have had, if there had been no layoffs.

[15] In addition, the Court permanently enjoins the City from laying off, suspending, or discharging, except for disciplinary reasons, any black police officer without the prior approval of this Court. This remedy is necessary to vindicate the needs of the individual black officers and the compelling state interest in a police force reflective of this community.

Similarly, the Court permanently enjoins the City from laying off, suspending or discharging, except for disciplinary reasons, any white police officer, without the prior approval of this Court. It is possible that one of the solutions the City will seek to the remedy in this case will be to attempt to layoff white officers with higher seniority than blacks. This the Court, at the present time, will not allow. The case law—*Bakke, Oliver, Arthur*—demands that the Court take into consideration the interests of white officers with higher seniority than blacks.

The financial information furnished to the Court, which perhaps could be relevant to this issue, was less than satisfactory. Although it was represented that the Budget Director of the City of Detroit would be produced as a witness, the City failed to produce him, and in his stead produced a budget analyst, Edward Rego, whose testimony was vague and imprecise upon budget figures.

Mr. Rego, while admitting that the budget of the City is merely a financial manifestation of a series of political choices, was unable to explain items amounting to some $300,000,000, nearly 20 percent of the 1.5 billion budget for 1984-1985. He made much of the claim that certain budget items are restricted by state or federal law, but the record, insofar as it was made, established that only 39 percent of City employees are on jobs which are funded from either revenue sharing or other grant monies from the federal or state governments.

Opinion

While the Police Department budget was less than 26 percent of the City's non-restricted budget, the Police Department's share of budget reduction effort in 1979, 1980, and 1983 was more than 50 percent of the total. This is so even though the cost of a police officer (salary plus fringes) proved to be ony $44,560, rather than the $50,000 per year earlier used by the City.

Next, the Court must concern itself with the rights of laid-off white officers who may be senior to black officers being called back under this order. Their interests must be taken into account in fashioning any final remedy. This is mandated by *Bakke*, *DPOA v. Young*, *Oliver v. Kalamazoo*, and *Arthur v. Nyquist*. But in every one of those cases, the white officers or teachers were actively present in the lawsuit and presented their interests. This did not happen here. Although the DPOA protested that it did represent the white officers, this Court has found that they did not, and that the white officers had not adequate representation in this case.[16] There is not showing on this record of the numbers or the interest of these officers, and the Court has nothing other than speculation upon which to make a determination of their interests.

This Court will therefore allow 30 days for any laid-off white officer, with greater seniority than any laid-off black officer called back, to intervene in this lawsuit for a determination of his or her interest. The Court expresses no opinion as to these interests, if any, nor does the Court express any opinion as to whether doctrines of estoppel, latches, etc. would bar the Court from considering their claims. The Court simply believes that, given the record introduced by the DPOA in this case, and contrary to their representations that they represented the laid-off white officers, equity requires that any white officer who desires be heard. It will be the responsibility of the City of Detroit to notify all laid-off white officers of this determination.

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[16] See colloquy between the Court and counsel, Transcript of Testimony, Volume 14, June 13, 1984, pp. 1649-53.

The next request for relief is the ordering of back pay. This Court will not order back pay relief against either the City or the DPOA. Even in Title VII cases, where back pay is generally presumed, the Court still retains equitable discretion and can deny it for equitable reasons. *See City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722-23, 98 S.Ct. 1370, 1382-83, 55 L.Ed.2d 657 (1978). But this is not a Title VII case. Here the Court has even greater equitable discretion under a constitutional analysis, especially in light of judicial mandates that constitutional remedies be tailored to the scope of the constitutional violation. *Milliken, supra, Oliver v. Kalamazoo, supra.* The Court must necessarily balance the individual and collective interests involved.

Although this Court has already held that class-wide remedial relief is not limited to individual victims of prior discrimination, and has ordered such remedial relief, and although this Court does not believe that any legal authority bars back pay in a situation such as is presented here, the Court must take into account the fact that no evidence has been presented that any individual member of the plaintiff class was an actual victim of racial discrimination in hiring. This is an equitable factor that must be weighed in balancing individual and collective interests and tailoring the scope of the remedy.

The wrong in this case was not only that of individual discrimination. It was also a collective wrong, a wrong to the expectations of the citizenry and the black police of the City of Detroit, who expected the City to be serious about its commitment to affirmative action, which would result in a police force reflective of the community. The collective interests outweigh the admittedly important private interest in back pay in this case, and merit denial of back pay.

Regardless of the amount of any back pay award,[17] it would certainly be substantial. These costs would be borne primarily by

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[17] If back pay were ordered, Chief Hart said it would ruin the City. Dr. Sidney Mitre, Professor of Economics at Oakland University, testified that the total wage loss suffered by all officers as a result of the layoffs was $50,734,700, the total pension loss was $32,321,667, and the fringe benefit loss $5,386,940, for a total of more than $86,000,000.

the black citizenry of Detroit. While financial inability to pay is no defense to a constitutional remedy, financial factors certainly must enter into the equitable balancing this Court must undertake. The relief the Court has ordered will sufficiently make the plaintiffs whole, and is tailored to the constitutional violation. In view of the fact that the violation here was to the collective interests of the laid-off officers and the citizens of Detroit, this Court believes justice will not be served by a massive back pay award, and therefore back pay will be denied.

IV

The DPOA, which was established in 1943, was formally certified to serve as the collective bargaining agent for all Detroit police officers below the rank of sergeant in 1966. It was granted its authority by the Public Employee Relations Act of 1965, M.C.L.A. § 423.211, which provides in pertinent part:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment . . .

[16, 17] As the exclusive bargaining representative for its members, the DPOA has a duty of fair representation under Michigan law. *Lowe v. Hotel & Restaurant Employees Union, Local 705*, 389 Mich. 123, 205 N.W.2d 167 (1973). Plaintiffs claim that the DPOA breached this duty, which is a pendent one brought under Michigan law. According to Michigan law, the Court must look to federal law for guidance in deciding the fair representation issue, since the full development of this doctrine has taken place through judicial interpretation of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. *See Bebensee v. Ross Pierce*, 400 Mich. 233, 253 N.W.2d 633 (1977).

[18, 19] The duty of fair representation is a judicially created remedy. There is no specific reference to it in either the NLRA or in Michigan statutory law. Instead, the doctrine has been developed by the judiciary as a necessary, and, in the case of racial discrimination, a constitutionally imposed duty arising from the grant of authority by legislatures to unions to be the exclusive representatives of their members. By allowing unions to be exclusive representatives of their members, and thus subsuming rights of minorities in collective bargaining, unions have not been granted licenses to practice racial discrimination in violation of either the Fourteenth Amendment or the equal protection clause of the Michigan Constitution. Mich. Const. Art. 1, § 2.

Since this case involves claims of racial discrimination by an exclusive bargaining representative (the DPOA), the Court must be especially sensitive to the fact that the duty of fair representation arose as a doctrine to protect minorities, and blacks in particular, from racial discrimination by unions. When the NLRB was originally established, leaders of black organizations expressed fears that by granting exclusive representative status to certain unions, racially discriminatory policies by unions would have the authority of a law.

Congress attempted to allay these fears in the debate surrounding the NLRA, and the United States Supreme Court firmly outlawed racial discrimination by unions by establishing the duty of fair representation in *Steele v. Louisville & Nashville Railroad Co.*, 823 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 178 (1944). The Court held there that the duty of fair representation required the union to represent minority union members without hostile discrimination, fairly, impartially, and in good faith:

> So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of

> the craft. While the status does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, . . . to represent nonunion and minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. . . .

Id. at 204, 65 S.Ct. at 232.

[20] It is clear that the exclusivity principle of the NLRA and M.C.L.A. § 423.211 is constitutional only if there is a duty of fair representation, and that means representation of all members of the union. The duty of fair representation is a fundamental limitation upon union activity. *Humphrey v. Moore,* 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

Without the judicially imposed duty of fair representation, the tradeoffs made by minorities in allowing unions to be their exclusive representatives in order to protect majority interest and to achieve industrial peace through the encouragement of voluntary agreements, the purposes of the NLRA would be hollow. In return for exclusive bargaining, blacks in the DPOA are prohibited from bargaining directly with the City of Detroit, and are prohibited from taking any direct action against the City of Detroit independently of the DPOA. *See Emporium Capwell Company v. Western Addition Community Organization,* 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975). The DPOA is the only spokesperson for black police officers to the employer, and thus has tremendous power over the welfare of black employees. The judiciary has a duty to see that this power is not abused, and does not become a grant of authority to practice racial discrimination.

Michigan has recognized the duty of fair representation as a matter of state law:

> In many ways, the relationship between a union and its members is a fiduciary one. Certainly it is a relationship of fidelity, of faith, of trust, and of confidence.

Lowe, 389 Mich. at 145, 205 N.W.2d 167.

And,

> [T]he union must act without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilfull, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion. . . .

Id. at 146-47, 205 N.W.2d 167.

There is no reason to believe that Michigan would interpret this duty more narrowly than the U.S. Supreme Court. The state has a historical commitment to the abolition of racial discrimination, and has been a leader in breaking down the barriers between races. In fact, to the extent that Michigan case law has evinced a standard different from the federal standard, it appears to be even more strict than the federal standard. "When the general good conflicts with the legal or civil rights of an individual member, the courts will recognize and enforce them as against the will of the majority union membership." *Lowe*, 389 Mich. at 146, 205 N.W.2d 167.

As a judicial remedy, the legal standard for finding a breach of the duty of fair representation must be somewhat open ended and flexible, given different factual circumstances. As Judge McCree pointed out in *St. Clair v. Local No. 15 of International Brotherhood of Teamsters*, 422 F.2d 128, 130 (6th Cir.1969): "The phrase 'fair representation' is something of a term of art, and the standards by which we are bound have not been set down explicitly in a code."

Thus, "fairness" is the standard for the duty of fair representation. The duty requires rational decision-making and procedural protection to protect minority members from discriminatory treatment. It has been said that the duty of fair representation creates a duty of "fair dealing." *International Union of Electrical Workers v. NLRB*, 307 F.2d 679, 683

(D.C.Cir.1961), *cert. denied* 371 U.S. 936, 83 S.Ct. 307, 9 L.Ed.2d 270 (1962).

The duty of fair representation was defined by the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . .

Id. at 177, 87 S.Ct. at 910.

The test was similarity stated in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir.1981):

> A union fails to fairly and impartially represent all members of a bargaining unit, and thus breaches its duty of fair representation, when the union's conduct toward any member becomes arbitrary, discriminatory or in bad faith. . . .
>
> Bad faith or fraud is not a necessary element of a charge of unfair representation if the union's conduct is otherwise arbitrary or perfunctory (citing cases). Arbitrary perfunctory union conduct which exhibits something more than simple negligence is a breach of the duty of fair representation.

Id. at 1103.

The *Farmer* court also pointed out that a union is required to represent its members fairly and impartially, and to make an honest effort to serve the interests of all without hostility to any. To fulfill its duty, the court said: "the union must have not only enforced the provisions of the collective bargaining agreement in a non discriminatory manner, it must have also fairly represented

all segments of the bargaining unit during the negotiations of each collective bargaining agreement." *Id.* at 1103.

Any one of three elements—arbitrariness, discrimination, or lack of good faith—can create a breach of the duty of fair representation. The standard was well summarized in *Griffin v. U.A.W.*, 469 F.2d 181 (4th Cir.1972):

> First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting its rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. *Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.*

Id. at 183. (emphasis added).

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court recognized that active or tacit consent to discriminatory enforcement of a facially neutral conduct could constitute a breach of the duty of fair representation. *Id.* at 46, 78 S.Ct. at 102. And the Second Circuit has found a duty of fair representation violation in a union's failure "[T]o provide substantive and procedural safeguards for minority members of the collective bargaining unit." *Jones v. TWA*, 495 F.2d 790, 798 (2d Cir.1974).

This circuit has recognized that the duty of fair representation is an active and affirmative obligation on the part of union leadership. The duty "requires a union to assert the rights of its minority members in collective bargaining sessions and not passively accept practices which discriminate against them." *E.E.O.C. v. Detroit Edison Company*, 515 F.2d 301, 314 (6th Cir.1975), *vacated*, 431 U.S. 951, 97 S.Ct. 2668, 53 L.Ed.2d 267 (1977), citing *Macklin v. Spector Freight Systems*, 478 F.2d 979 (D.C.Cir.1973). *See also Bonilla v. Oakland Scavenger Company*, 697 F.2d 1297, 1304 (9th Cir.1982): "The union has an

affirmative obligation to oppose employment discrimination against its members."

[21, 22] The union's obligation under the duty of fair representation is analogous to that of a fiduciary to a principal. Clearly the union has a higher standard to its members than the standard owed by the employer to the employee. This is confirmed by language in *Steele:* "It is a principle of general application that the exercise of a granted power to act on behalf of others involves the assumption towards them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty towards those for whom it is exercised unless so expressed." 323 U.S. at 202, 65 S.Ct. at 232.

Under the standard first established in *Steele,* elaborated in *Vaca v. Sipes,* and recognized by the Michigan Supreme Court in *Lowe,* and in keeping with the firm policy of the State of Michigan against racial discrimination, this Court finds the DPOA guilty of a breach of its duty of fair representation through its failure to adequately represent the interests of its black members in the layoffs of 1979 and 1980.

[23] Initially, it must be stated what this liability is *not* predicated upon. It is not predicated upon any adherence by the DPOA to a seniority-based system of layoffs. This Court finds the seniority system negotiated between the DPOA and the City to be bona fide. Nor is this liability predicated upon any duty of the DPOA to make concessions or give up demands won at the bargaining table and in the courts. The Court agrees with the DPOA that no such *per se* duty to minority members of a bargaining unit exists, and this finding of liability does not imply such a duty.

[24] The DPOA's breach of the duty of fair representation flows not merely from any reliance upon a seniority system, or a simple refusal to make concessions in the interest of minorities.

The D.P.O.A.'s liability is premised on more than this, and flows inescapably from the following findings:

1. *A history of racial hostility and indifference to the rights and needs of black officers.*

The history of black relationships with the DPOA is one showing at the best indifference, and at the worst hostility, to the blacks by the white members of the DPOA throughout the years.

Witness after witness, all black and all police officers or sergeants, testified to the discriminatory manner in which they were treated by the DPOA. Of particular significance was the testimony of Fernon Douglas, a black police officer who came on the force in 1972 and is still a member of the Detroit Police Department. In 1978, he was elected a shift steward and also a chief steward of the DPOA. In 1978, he was nominated for sergeant-at-arms, one of the four officers of the union, but did not run after John Vella, a white member of the executive board, told him that, if he ran for sergeant-at-arms, all blacks would be removed from committee assignments. Vella denied making such a statement, but the Court finds as a matter of fact that he did.

Douglas was nominated again for sergeant-at-arms in September 1982, but, after a meeting of black stewards, he decided not to run. Additionally, he was active in proposing constitutional changes, one of which would have required that no DPOA funds be spent for litigation, except for litigation relating directly to the contract between the City and the DPOA. This amendment, and other constitutional amendments proposed by him and other black officers, were soundly defeated.

It is true that the DPOA has always represented black officers in disciplinary proceedings and court proceedings the same as they represented white officers, but this does not change the fact that in 1979 and 1980 the union did not adequately represent its black members in bargaining to prevent their layoffs.

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Throughout, the DPOA has maintained opposition to all forms of affirmative action by the City and the Police Department. In addition to demanding strict seniority in its contract, it has intervened repeatedly in litigation designed either to block implementation of affirmative action, or supported those trying to block affirmative action. Testimony was introduced indicating that the DPOA has spent over $500,000 financing its anti-affirmative action litigation. And this intervention has not been limited to the City of Detroit. For example, it has filed amicus briefs supporting challenges to affirmative action in Boston, New Orleans, and Memphis. In none of these cases was the DPOA directly involved, and efforts of black members to amend the constitution to prohibit the use of union funds for such amicus briefs were soundly defeated by the organization.

It should be obvious to any neutral observer that blacks, who at one point comprised almost 40 percent of the DPOA, would be greatly offended by the use of such vast sums of money to fight what blacks believed to be efforts to achieve racial equality for them.

To partially deal with the problems of black officers, the Guardians, an organization of black police officers of all ranks, and from departments other than Detroit, was formed in the early 1960's. In addition, the Committee of Police Officers for Equal Justice (CPOEJ) was formed to deal with the problems of black officers. The DPOA avoided dealings with either the Guardians or the CPOEJ, and is hostile to these organizations. In some contexts, the DPOA's explanation that these organizations had supervisors and non-Detroit members and, therefore, created dual union concerns, would be legitimate. The Court finds, however, that in the context of past racial discrimination against blacks in the Detroit Police Department, and the past racial hostility of the DPOA, these explanations are largely pretextual.

Further support for this conclusion is found in the fact that, according to the testimony of the DPOA officials at trial, not a single black officer in their union is worthy of trust. Any member

of the Guardians is automatically "disloyal." Non-members of the Guardians, like Fernon Douglas, who still expresses black concerns yet is a militant unionist; are "not interested in the union as a whole." These explanations are pretextual, especially given the broad-based support of the Guardians, and the support from both black and white officers enjoyed by Fernon Douglas. In 1978, Lewis Colson, a black officer, ran for vice-president on the Guardian slate and received 1,100 votes. The same year, Deborah Robinson, a presidential candidate received 1,200 votes. Blacks in 1978 made their largest gains ever in terms of union positions in the DPOA, and the Court cannot believe that this political consideration did not play a role in the DPOA leadership's passivity in face of the 1979 and 1980 layoffs.

2. *The total absence of black representation in the leadership levels of the union.*

Throughout its entire history, the DPOA has been a white-dominated union. It has a board of directors, made up of 75 stewards, who are elected in each precinct and division, and from each shift. The board of directors elects from its members nine persons to serve on the executive committee, and the membership at large elects four officers; the president, vice-president, secretary-treasurer, and sergeant-at-arms. All committee appointments are made by the president, with the approval of the executive committee.

No black has ever been elected to any one of the top four positions in the DPOA in its 41-year history. There have only been two black members who have served on the executive board, and the board of directors has only 18 nonwhite members.

The most significant committee of the DPOA is the grievance committee, which consists of three members, who, along with the four elected officers, constitute the bargaining committee. No black has ever served on the grievance committee. Nor has any black ever served on the finance committee, another major committee of the DPOA. As stated earlier, this Court rejects explanations that there were not sufficient "trustworthy"

blacks to fill these positions or that "political patronage" should be the only criterion for union leadership when this patronage operates to exclude blacks.

3. *The massive nature of the 1979 layoffs—one-quarter of the DPOA membership, one-half of the black membership, a loss of approximately $500,000 a year in dues, and the totally perfunctory and passive behavior of the union leadership.*

As early as the Spring of 1977, the City began efforts to obtain DPOA agreement to a proposal that future layoffs be carried out in a manner that would avoid having a racially discriminatory impact on blacks and women. These proposals were strongly and consistently resisted by the DPOA. Affirmative action layoff procedures were proposed again in 1978, and throughout discussions and negotiations the Union would at no time back off its position on seniority and its refusal to consider any type of affirmative action layoffs.

Finally, the first layoffs came in October 1979. Mark Ulieny, the City's Labor Relations Director, advised Mr. Watroba, by letter on September 27, 1979, that 400 police officers would be laid off as of October 12, 1979. Although the position of the DPOA had been that the City was merely posturing, as of September 27, 1979, it knew that it was no longer posturing. Nonetheless, the DPOA did nothing to avert the 1979 layoffs. 71 percent of those laid off at that time were black officers. No effort was made to use the same formula successfully used on 1975, when a majority of those to be laid off were white, and no other effort was made, as it was in 1981, when the vast majority of those to be laid off were white.

In February 1980, the City again proposed, as to layoffs, that seniority should be used only to the extent that it does not reduce the proportions of minority group members or females within the bargaining unit. This proposal was flatly rejected by the DPOA.

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The record is clear that the DPOA was well aware, as early as the Spring of 1980, that upwards of 700 police officers were to be laid off in the fall, and that the overwhelming majority of those to be laid off would be black. Even though officers of the DPOA testified that they thought the City was merely posturing, it is clear that they knew that more layoffs were coming, and it was clear the DPOA was not going to take significant action to avoid them. In the August 18, 1980 issue of *Tuebor*, the union newsletter, there is specific mention of the anticipated layoff of more than 700 DPOA members within a matter of days.

On August 29, less than two weeks after the *Tuebor* issue which described in great detail the potential layoffs, Mayor Young sent a letter to Watroba inviting him to a meeting to discuss ways of averting the scheduled layoffs. In that letter, the Mayor spoke of the impending layoffs of 690 Police Officers, and emphasized the disastrous effect it would have upon the City's past affirmative action:

> But there is an additional reason why these layoffs will hurt us all. During the past seven years, we have been working to create a police department integrated by race and sex through an affirmative action program. This program was an essential pre-condition to establishing harmonous police-community relations, without which our police can never effectively carry out its duties.
>
> Because these layoffs are being made according to strict seniority, in accordance with the present contract, and not in pursuance of our affirmative action program, they will drastically reverse our progress towards the goal of a fully integrated police force, and we will be moving towards a department again composed predominately of white and male officers.

The Mayor then made specific proposals to the Union:

> Recent negotiations for a new contract have proved fruitless and the issues are about to be submitted to final

arbitration, as required by existing law. This is one such issue. However, it will be many months before a decision is made. As a temporary measure, without prejudice to our respective positions before the arbitrator, I suggest the following alternative procedures for the impending layoffs:

1. Instead of seniority being the sole criterion for layoffs, thus resulting in grossly disproportionate layoff of blacks and women, we agree that layoffs be made on the basis of separate lists, such as the plan for proportions which was approved by the Sixth Circuit Court of Appeals recently, as an appropriate means of implementing our affirmative action program.

Or, if you prefer;

2. Instead of any layoffs, a 13.8 reduction in the Police Department payroll be agreed upon, with by equal reduction by all officers of workdays or some other equitable method.

Governor Milliken's recent proposal for applying an affirmative action program to the layoff of State employees has just been approved by the Michigan Civil Service Commission and serves as an example of what we can do for Detroit by mutual agreement. I realize the shortness of time. But our commitment to the welfare of our community compels all of us to do what we must to avoid moving backward towards racial hostility and divisiveness.

When asked what the union response to the Mayor's proposal was, Watroba replied that seniority was the cornerstone of unionism, and that the DPOA would not, under any circumstances, negotiate separate layoff lists in which race was a factor in determining who was to be laid off. He said that, if they were going to deal with the Mayor, they would have to deal on the basis of his second proposal, a 13.8 percent wage reduction, and not his proposal for separate layoff lists. He said, however, that, while the union was willing to pursue some quid pro quo in the negotiations with the Mayor, it was never going to agree to 13.8

percent. He said that, if 13.8 percent was the bottom line, the answer of the union would have to be no.

Watroba responded to the Mayor's letter on September 3, 1980, stating, inter alia:

> We fully recognize our duty to bargain on behalf of all of our members. Our seniority clauses have been bargained with the interest of our total membership in mind. They cannot be cast aside when the very situation they were designed to cover is about to occur. You will recall the City voluntarily withdrew its demands for proportionate layoffs of blacks and whites in the last rounds of negotiations.
>
> * * * * *
>
> The City must be willing, in the process, to negotiate about all factors leading to the budget shortfalls, including ill-advised, ill-timed promotions, the elimination of artificial quotas, and restraints upon *equal* opportunity. If you, without pre-conditions eliminating areas of bargaining, will personally begin marathon good-faith bargaining designed to settle the contract, rather than enhance images, we are prepared to start at 7:00 p.m. on September 8, 1980, or at your earliest convenience.

The Mayor responded to Watroba's letter the same day indicating his willingness to bargain and to meet with reference to the layoffs. He made the further observations in that letter:

> First, in response to your statement that no previous "meaningful proposals were made to avert the layoff" by the City, let me remind you that on April 2, 1980, during negotiations with the DPOA, we proposed that pay rates be reduced to the level of the pay increases that other City employee unions accepted. This would have avoided all police layoffs.
>
> Again, on June 17, the City asked the DPOA to waive retroactive pay adjustments due from July 1977 to December 1978, and to waive the COLA roll-in due July 1, 1980.

In return for agreement of this proposal, the City offered to reduce the scheduled layoff by 440 employees. As you will recall, the DPOA rejected both of these proposals.

Second, I must question the extent of your concern about the impact of the layoffs on affirmative action gains in the Detroit Police Department. The DPOA's brief on economic issues, prepared for the Act 3-12 Arbitration Panel in 1977, said: "The DPOA does not question management's right to determine manpower levels, but questions whether veteran police officers should subsidize new hires." This language makes it apparent to me that the DPOA had no qualms about sacrificing the jobs of new police officers to finance its economic demands.

* * * * *

In closing, let me remind you that affirmative action as a concept is not negotiable. It is mandated not only by the City Charter, but also by State and Federal law, and by the courts, as well.

It is also my opinion that the duty to implement affirmative action does not stop just because we have found more equitable ways to hire new police officers. Rather, we have a double duty—that we are now challenged to find equitable ways to implement the September 5 layoffs.

The fact that we have found ways to remove hiring barriers at the front door does not relieve us of our obligation to find ways to remove comparable barriers at the back door now that the circumstances require it.

In the meantime, the executive board of the DPOA met on September 2. While that meeting was in progress, Lewis Colson, executive director of the Guardians, hand-delivered a letter to Watroba. Watroba testified he left the meeting to receive the letter and to talk to Colson. In that letter, the Guardians called for action other than standing merely on seniority with reference to layoffs. The letter, in pertinent part, said:

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The Guardians are extremely disturbed by the planned layoffs of 690 officers scheduled for September 5, 1980. The reported statistics indicate that these layoffs will have a disproportionate effect on minority and female officers. When considered in connection with the 400 officers laid off in October, there is a real reversal of the progress that has been made to integrate the police force at all levels.

As you know, Mayor Young has indicated he is willing to discuss other options to avert the proposed layoffs. We understand his proposals call for the *temporary* institution of separate seniority lists, or a *temporary* reduction of work hours and pay. We believe that either of these suggestions is reasonable, and we urge you to accept one of them, or at the very least, to negotiate in good faith with the Mayor to avoid the layoffs. As you are aware, prior to the introduction of the City's affirmative action plan for the department the minority representation on the police force was less than 5 percent. Over the last six years, as the direct result of the affirmative action plan, the minority representation rose to over 33 percent prior to the October 1979 layoffs. However, the impending layoffs of 693 police officers will reduce the minority representation to less than 26 percent.

It is common knowledge in our community that the integration of the police force, to the extent it has occurred, has had a profound and positive effect on police and community relations. The wide spread alienation of black Detroit residents from the Police Department has changed. Individual citizens and community groups alike are beginning to identify and work with the police. The affirmative action program has been in effect since 1974. Since that time there has been a 30 percent reduction in crime and, most importantly, no police officer has been killed in the line of duty.

Finally, we believe the Union is duty bound, by its own constitution and by law, to protect that job security of all its members. Article III, § 2 of the Union's Constitution requires the Union's leadership to promote job security.

> Additionally, as the DPOA is the exclusive bargaining agent for all of the police officers, it owes a legal duty to fairly represent *all* officers—black and white, male and female. If the DPOA stands idly by and watches minority and female officers be subject to disproportionate layoffs, when the Mayor has offered reasonable ways to avert this result, the Guardians will believe that the DPOA intends this result. We will, therefore, view this an intentional act by the DPOA to violate the duty of fair representation owed to minority and female members, and we will take appropriate action.
>
> This letter was never answered.

On the eve of the layoffs, September 5, 1980, Watroba met with the Mayor and others in the Mayor's office for approximately three and one half hours. The DPOA at that meeting proposed a "25 and out" plan and the City adoption of a Chrysler model, by which there would be a freeze or a deferral of benefits otherwise due, with some kind of a pay-out at a later date. It also proposed there be discussion of standards and criteria concerning promotions from bargaining units. The union rejected the dual seniority lists, and also the Mayor's 13.8 percent pay reduction proposal. They also rejected a lower figure of either 12 or 12.8 percent. Additionally, Watroba rejected the Mayor's suggestion that the membership be permitted to vote on whether to accept a 13.8 percent reduction or some other lower percentage reduction.

Nothing came of the meeting. The Union would not budge on its opposition to a pay reduction or separate seniority lists, and the layoffs went into effect the next day.

At no time did the union make any reasonable effort to avert the layoffs. This is in stark contrast to the actions taken by the DPOA in 1975 and 1981 when layoffs were threatened and the vast majority of officers who would be laid off were white. See discussion of these concessions *infra*. Here the layoffs affected principally black officers, and no realistic efforts to avert the layoffs were made.

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The union's response to the threatened layoffs of 690 officers, which would, with the 1979 layoffs, total one-quarter of their union and one-half of the black membership, was totally perfunctory. No special meetings were called at any level of the union. The union officials who took the stand at trial could not even recall if the layoffs were discussed at the routine, regular meetings which took place during the period. No response at all was given to Colson's letter—it was simply referred to counsel, and the DPOA leadership awaited this lawsuit. No votes regarding any possible compromises were taken at any level of the union, which could have at least allowed the laid-off officers to express their views and test its support in the union. It is this perfunctory behavior of the DPOA officials that breached the duty of fair representation here, not any per se refusal to make concessions or agree to affirmative action layoffs.

4. *The present day failure to make any serious efforts to assist these black officers.*

It is significant that the 1983 bargaining demands of the union do not in any way address themselves to the recall of laid-off officers. The DPOA contended at trial that some bargaining demands tangentially affect the layoffs, such as the reduction of police reserves, and the demand that there be only one call to any police car at any time, but these demands are so tangential as to have little, if any, effect on layoffs. The actual fact is that the union, even in its 1983 demands, evinced no real interest in getting black laid-off police officers back to work. Again, given the DPOA's history, this Court cannot believe that this behavior would be the same if one-half of its white membership was laid off.

5. *A history of concessions and prompt union action to avert layoffs in 1975 and 1981 when the jobs of white officers were at stake.*

In 1975, a layoff of police officers, most of whom would have been white, was threatened, and litigation was commenced, which was assigned to Judge Damon Keith, then a United States

District Judge. Judge Keith mediated a solution. The net result of the mediation was to avert layoffs of police officers, the vast majority of whom would have been white. An agreement was reached that, during a period of 18 months, each member of the bargaining unit would take 14 days off without pay, and would get an additional ten days off with pay, and that these 24 days could be taken off during the 18 month period. Other minor concessions were made, and layoffs were averted.[18]

In 1981, further layoffs were threatened because of the City's financial condition. The union agreed to a pay freeze to protect the jobs of the officers. At that time, the officers who would have been laid off were largely white officers. In return for the pay freeze, the DPOA obtained improved longevity, better vacation, better dental program, and the elimination of a 55 year old retirement age, so that officers could retire after 25 years of service. It should be noted, however, that this was basically a concession contract, with no wage increases at a time of fairly serious inflation in this country.

The actions of the DPOA in 1975 and 1981, when largely white officers would have been involved in layoffs, resulted in concessions to protect jobs. This activity stands in sharp contrast to its actions in 1979 and 1980 when the layoffs affected principally black officers.

The union argues that the situation was different in 1975 and 1981. The Court recognizes that there are differences. The 1975 solution did not appear to be a very popular one with the City. The 1981 solution took place at a time of great financial

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[18] During the first 12 months of the agreement, the first time that an officer would call in sick, that officer's sick bank would not be reduced, but rather one of the 10 paid days would be reduced and used in a sick bank as a sick day as opposed to depleting the sick bank. It was further agreed that, with reference to holidays worked, all officers would receive 12 hours compensatory time as opposed to payment for working on holidays, and for a 12 or possibly 13 month period, they were to be paid for less hours of work, so that for every two week pay-period, they would receive 76 hours of pay rather than 80 hours of pay.

distress for the City, and the union was told that the City was on the verge of bankruptcy.

However, these differences do not explain the basic fact that, when white officers were to be laid off, the union did *something;* when the overwhelming majority were blacks, the union did *nothing.* It is not the business of this Court to decide precisely what the DPOA should have done in 1979 and 1980. The duty of fair representation creates no such guidelines. The duty only commands that the union, when racial minorities are involved, behave in a manner that is representative, not perfunctory and passive. This is what the DPOA failed to do here.

The DPOA has offered other explanations for its actions in 1979 and 1980. It must be emphasized that this Court has no role in, nor desire to enter into, the collective bargaining process, and question collective bargaining decisions made by the DPOA in the course of negotiations with the City. The union has a wide range of discretion in bargaining insofar as these efforts are reasonable. *See Ford Motor Co. v. Huffman,* 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953).

Thus, this Court is not concerned with any reasonable activity of the DPOA in collective bargaining, even certain activity which sacrifices the interests of minorities for the majority. This Court is only concerned with activity that is arbitrary, racially discriminatory, and not in good faith. And this Court finds that in its representation of its black members, the DPOA's perfunctory and passive behavior in 1979 and 1980 breached the duty of fair representation.

This finding of liability of the DPOA is not predicated upon any legal finding that its defense of a bona fide seniority system was per se wrong. It is recognized that there have been no prior judicial findings of intentional racial discrimination against the DPOA as there were against the City of Detroit, and it is well recognized by this Court that Title VII protects from liability bona fide seniority systems. *See Teamsters* and *Stotts, supra.* It was the DPOA's action *as a whole,* not the defense of any

particular position, that was unreasonable and breached the duty of fair representation here.

There is nothing in *Stotts*, or any other case, that would prevent a union and employer from mutually and voluntarily agreeing to an affirmative action layoff system in the future. Nothing compels a bargaining representative to limit seniority clauses solely to the relative lengths of employment of respective employees. *See Ford Motor Co. v. Huffman, supra. See also Burchfield v. United Steelworkers of America*, 577 F.2d 1018 (5th Cir.1978). Seniority rights are creatures of contract, always subject to modification. Thus, there is no merit to the DPOA's argument that there were legal obstacles to a *voluntary* agreement regarding affirmative action layoffs.

For the reasons given, the Court finds that the DPOA has breached the duty of fair representation owned to its minority members and must respond legally.[19]

The Court finds no liability of the DPOA under the Thirteenth Amendment. It has found no case law applying to the Thirteenth Amendment under the facts of this case, and declines to do so here. The Court finds no reason to consider the claim under 42 U.S.C. § 1981 in light of the result reached here. The Court finds no violation of 42 U.S.C. § 1985(3). *See* n. 14 *supra*.

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[19] This finding has support in *Brown v. Neeb*, 644 F.2d 551 (6th Cir.1981):

> We find the Union's refusal [to agree on wage reductions] disturbing. Where large numbers of union members scheduled for layoff are members of a racial minority, a union's refusal to take pay cuts to avert layoffs is significant, *prima facia* evidence of racial discrimination. This is especially true in a situation where the laid-off minorities were recently hired under an affirmative action plan and/or where the union has opposed affirmative action.

V

The Court having determined that the defendant DPOA has breached its duty of fair representation, it now must turn to a consideration of relief.

In determining relief, the Court retains the full measure of its equitable and legal power to fashion a remedy that is just and equitable to all parties.

The Supreme Court in *Steele, supra,* said:

> We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty,

323 U.S. at 207, 65 S. Ct. at 234.

In fashioning a remedy, this Court, as a chancellor, does not desire to punish defendants for what they have done in the past, but to fashion a remedy that will insure that in the future the DPOA will adequately represent, as a bargaining agent, all of its members, and will not discriminate against its minority members.

No assessment of damages will be made against the DPOA, but rather, an order will be entered guaranteeing that the black members of the DPOA have their just and fair say in the operation of the union. In this way, positive steps towards preventing a future breach in the duty of fair representation will be taken.

If the black members of the DPOA are given their proper representation in the leadership structure of the DPOA they can, in the future, protect minority members against a breach of the duty of fair representation by the Union. It is this goal that this Court seeks. The Court is only intervening in the internal affairs

of the DPOA to the extent necessary to assure adequate representation of black members in the relationship between the DPOA and the City of Detroit.

[25] Therefore, the following relief against the DPOA will be ordered: within 12 months of the date of this opinion, all committees of the DPOA, especially grievance and finance, the board of directors, and the executive board shall reasonably reflect the racial composition of the union.

At the end of 12 months, plaintiffs shall notice a hearing before this Court so that the Court can determine if there has been substantial compliance with this order, and a good-faith effort to reach the goals set forth above. At that hearing, the Court will take such action as it deems necessary against the DPOA, if it has failed to comply with this mandate.

VI

For the reasons given in this opinion, a judgment will issue embodying the following:

1. The previous determination of this Court that the City breached its affirmative obligations to plaintiffs in violation of their rights under the Fourteenth Amendment in the layoffs of 1979 and 1980 is reaffirmed.

2. The City of Detroit is ordered to recall all black police officers laid off in the 1979 and 1980 layoffs who desire to return to the force, and who are qualified for police work, within 180 days, and submit a plan to accomplish this to this Court within 30 days.

3. No back pay will be awarded to any recalled officer, but all recalled officers will be entitled to the full seniority they would have had, if they had remained on duty from the time of the layoffs until the time of the recall.

4. The City of Detroit shall not lay off, suspend, or discharge any police officer, except for disciplinary reasons, without

the prior approval of this Court. This order will remain in effect until the further order of this Court.

5. Any white police officer laid off in the 1979 and 1980 layoffs who has seniority over any black officer recalled may, within 30 days, petition this Court for consideration of his or her case, and for consideration of his or her recall. The Court expresses no opinion as to the merit of any such claim.

6. The DPOA breached its duty of fair representation under Michigan law in bargaining on behalf of plaintiff police officers.

7. The DPOA is ordered, within 12 months, to remedy its breach of the duty of fair representation by having a reasonable representation of blacks in the leadership structure of the DPOA, including, but not limited to, the board of directors, all committees, and the executive committee. Within 12 months from the date of this opinion, the Court will conduct a further hearing to determine if reasonable representation has been achieved and, if it has not, to determine what remedies the Court will order against the DPOA for its failure to comply with this order.

This opinion shall constitute the findings of fact and conclusions of law required by F.R.C.P. 52(a).

Opinion

N.A.A.C.P., DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poellnitz, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees (84-1836, 85-1026, 85-1027), Cross-Appellants (85-1041),

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider, President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and the Michigan Employment Relations Commission, Defendants-Appellants (84-1836, 85-1026, 85-1027), Cross-Appellees (85-1041),

and

Kenneth C. Champagne; Mark Surma; Marsha Dreslinski; Adela Matias-Rivera, et al., Applicants in Intervention-Appellants (85-1027).

Nos. 84-1836, 85-1026, 85-1027 and 85-1041.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 20, 1986.

Decided June 12, 1987.
Rehearing and Rehearing En Banc
Denied Aug. 31, 1987.

Black Detroit police officers brought action against city, mayor, police department, police commissioner, police chief, and police officers association, alleging that city had violated affirmative duties imposed by previous approval of city's voluntary affirmative action plan, and that association had breached its duty of fair representation. The United States District Court for

the Eastern District of Michigan, Horace W. Gilmore, Jr., 591 F.Supp. 1194, enjoined city from laying off any police officers because layoffs reversed effects of voluntary affirmative action plan, and further found that association had breached its duty of fair representation to black association members. Appeal was taken. The Court of Appeals, Merritt, Circuit Judge, held that: (1) district court erred in concluding that doctrine of collateral estoppel permitted it to modify previously approved voluntary affirmative action plan and prevent city from laying off any police officers as part of planned reduction in force, and (2) under Michigan law, police officers association's failure to act forcefully regarding planned layoffs did not constitute breach of duty of fair representation.

Injunctive orders reversed, case remanded.

1. Judgment—634

Before collateral estoppel may be applied to bar litigation of issue, it must be established that precise issue raised in present case was raised and actually litigated in prior proceedings, that determination of issue must have been necessary to outcome of prior proceeding, that prior proceeding resulted in final judgment on merits, and that party against whom estoppel is sought had full and fair opportunity to litigate issue in prior proceeding.

2. Judgment—715(3)

Although city's institution of voluntary police department affirmative action plan was previously determined to be constitutionally permissible, based on city's own determination that it had discriminated in past, and precluded city from denying fact of prior discrimination, doctrine of collateral estoppel did not thus warrant modification of previously approved voluntary affirmative action plan and foreclose application of bona fide seniority layoff provisions of collective bargaining agreement between police association and city.

3. Labor Relations—52

Public employees of political subdivisions of state are not governed by federal labor law. National Labor Relations Act, § 2(2), as amended, 29 U.S.C.A. § 152(2).

4. Labor Relations—178, 219

City Police officers association's failure to act forcefully in response to city's threatened layoffs of black police officers hired under voluntary affirmative action plan did not constitute breach of association's duty of fair representation; under Michigan law, city's initial decision to lay off officers, as part of planned reduction in force that was permitted under collective bargaining agreement last-hired, first-fired provision, was permissive subject of bargaining, and union had no mandatory duty to act on behalf of its members in response to threatened layoffs.

Walter S. Nussbaum (lead counsel), Mara Kalnins-Ghafari, Donald J. Mooney, Jr., argued, Paxton & Seasongood, Cincinnati, Ohio, Jack F. Fuchs, Farmington Hills, Mich., Frank W. Jackson, Detroit, Mich., Teri L. Hayles, Daniel B. Edelman, argued, Washington, D.C., for defendants-appellants.

Daune Elston, Thomas Atkins, (lead counsel), argued, Brooklyn, N.Y., Jeanne Mirer, Gary Benjamin, James W. McGinnis, Detroit, Mich., for plaintiffs-appellees.

Diane L. Vaksdal, argued, Mountain States Legal Foundation, Denver, Colo., for applicants in intervention-appellants.

Before MERRITT, WELLFORD and NORRIS, Circuit Judges.

MERRITT, Circuit Judge.

Two questions are raised in this case arising from the layoff of black employees hired under an affirmative action plan. The first question is whether prior judicial approval of a public employer's affirmative action plan forecloses that employer from later laying off recently hired employees who would otherwise be

laid off on the basis of seniority under a collective bargaining agreement. This case arises because the City of Detroit laid off 1100 police officers in 1979-80, approximately 75 percent of whom were black. The layoffs occurred under the last-hired, first-fired provision of the City's collective bargaining agreement with the Detroit Police Officers Association.

In *Bratton v. City of Detroit*, this Court upheld a *voluntary* affirmative action plan providing for the promotion of a black sergeant to every second job opening for lieutenant in the police department of the City of Detroit. *See* 704 F.2d 878 (6th Cir.) *(Bratton I)*, *modified*, 712 F.2d 222 (6th Cir.1983) *(Bratton II)*, *aff'g Baker v. City of Detroit*, 504 F.Supp. 841 (E.D.Mich. 1980), *modifying* 483 F.Supp. 930 (E.D. Mich.1979), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). In that case, although we held that the factual and legal basis for the promotional plan was sufficient to justify the City in adopting the plan *voluntarily*, we specifically and expressly reversed the District Court order which made the plan mandatory. See *Bratton II*, 712 F.2d at 223.

In this case, the District Court, applying the doctrine of collateral estoppel, held that our decision in *Bratton* forecloses further litigation on the issue of prior discrimination in the police department, and leads to the conclusion that the City could not lay off any police officers as part of a planned reduction in force. *See NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194 (E.D.Mich.1984). The net effect of the District Court's order is to mandate that the City may not reduce the staffing and budgetary level of the police department in effect at the time of the order without the prior permission of the court. The District Court enjoined the City from laying off any police officers under the plan because the layoffs reversed the effects of the voluntary affirmative action plan. Based on its collateral estoppel ruling, the District Court ordered reinstatement of all officers previously laid off pursuant to the plan.

Opinion

The City of Detroit and its Mayor, Coleman Young, and the Detroit Police Officers Association appealed the issuance of the injunction preventing any layoffs. The Mayor, the City, and the union argue that the District Court erroneously applied doctrines of estoppel to significantly modify what had previously been a *voluntary* affirmative action plan.

The doctrine of collateral estoppel dictates that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *see generally* C. Wright, *Law of Federal Courts* 678-96 (4th ed. 1983).

[1] Before collateral estoppel may be applied to bar litigation of an issue, four specific requirements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceedings;[1]
>
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;[2]
>
> (3) the prior proceeding must have resulted in a final judgment on the merits;[3] and

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[1] *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.* 402 U.S. 313, 323, 91 S.Ct. 1434, 1439, 28 L.Ed.2d 788 (1971); *United States v Smith*, 730 F.2d 1052, 1057 (6th Cir.1984); *Spilman v Harley*, 656 F.2d 224, 228 (6th Cir.1981).

[2] *See Parklane*, 439 U.S. at 326 n. 5, 99 S.Ct. at 649 n. 5; *Smith*, 730 F.2d at 1057; *Spilman*, 656 F.2d at 228.

[3] *See Blonder-Tongue*, 402 U.S. at 323, 91 S.Ct. at 1439; *Smith*, 730 F.2d at 1057.

(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.[4]

Applying these principles to the facts of this case, it was proper for the District Court to invoke doctrines of estoppel and judicial admission to preclude the City from denying the facts of prior discrimination that it had earlier demonstrated and conceded. *See Baker*, 483 F.Supp. 930 (E.D. Mich.1979). However, it was incorrect for the District Court to then rely on these findings as the sole basis for making a very significant modification to the voluntary plan by disallowing *any* further layoffs until the goals of the plan are met.

[2] In *Bratton*, we merely recognized as a sufficient justification for its voluntary plan the City's *own* determination that it had discriminated in the past. We therefore held that the City's institution of a voluntary affirmative action plan was constitutionally permissible. *See Bratton I*, 704 F.2d at 886-90. This is a different issue from whether a constitutional violation has occurred which mandates a court-ordered remedy. *See Bratton II*, 712 F.2d at 223; *Bratton I*, 704 F.2d at 902 (Merritt, J., dissenting). It was therefore improper for the District Court to rely solely on the *Bratton* findings and conclusions to set aside the reverse seniority provision of the collective bargaining agreement. The constitutional and social policies that permit affirmative action do not mandate it. Such a rule would only lead employers to reject voluntary affirmative action at the outset so as not to compromise their flexibility in the future when reductions in force become necessary.

The court in *Bratton* did not impose a legal duty on the City to hire or retain the particular employees being laid off here. Judicial approval of a voluntary affirmative action plan does not create a contract of permanent employment or invalidate or

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[4] *See Haring v Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983); *Allen v McCurry*, 449 U.S. at 95, 101, 101 S.Ct. at 415, 418; *see generally* Restatement (Second) of Judgments § 29 (1982).

modify a collective bargaining agreement providing for layoffs on the basis of seniority. The District Court erred in reading the doctrine of collateral estoppel to modify a previously voluntary affirmative plan and thereby foreclose application of the bona fide seniority layoff provisions of the collective bargaining agreement.

On the second issue presented on appeal, the District Court, in deciding a pendent state claim, held that the Detroit Police Officers Association breached the duty of fair representation it owed to its minority members under Michigan law. This finding was predicated upon the union's "perfunctory and passive" behavior in response to the layoffs at issue in this case. *See NAACP v. DPOA*, 591 F.Supp. at 1219. The Court found that the breach occurred because the union did not fight the layoffs forcefully or effectively. At the outset we should note what the finding was *not* predicated upon: There was no finding of intentional discrimination by the union against its members. The District Court stated that the union had not been found guilty of intentional discrimination, and that its defense of the bona fide seniority provision was not improper. *Id.* The District Court's finding of liability instead stemmed from the union's action "as a whole" in response to the threatened layoffs, not its "defense of any particular position." *Id.* To remedy this alleged breach of the duty of fair representation, the District Court ordered the union to integrate black officers into its leadership structure within one year.

Courts are reluctant to allow the electoral processes of a union to be abridged. In *Donovan v. Illinois Education Ass'n*, the Seventh Circuit struck down a union's *voluntary* plan to allocate a certain percentage of its elected offices to minorities where there had been no finding of prior intentional discrimination by the union. *See* 667 F.2d 638, 640-42 (1982) (applying federal labor laws).

[3] The union is concededly the exclusive bargaining agent under state law for all Detroit police officers below the rank of

sergeant.[5] Public employees of the political subdivisions of a state are not governed by the federal labor laws. *See* 29 U.S.C. § 152(2) (1982). Therefore, the laws of Michigan define the permissible contours of the relationship between the union and its members. *See* Mich.Comp.Laws § 423.201 *et seq.* (1978).

In *Goolsby v. City of Detroit*, 419 Mich. 651, 660-61 n. 5, 358 N.W.2d 856, 861 n. 5 (1984), the Michigan Supreme Court expressly recognized the union's duty of fair representation under the state's labor law. The *Goolsby* Court generally adopted the fair representation standard enunciated by the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Under this analysis, the duty of fair representation is comprised of three distinct responsibilities: "(1) 'to serve the interests of all members without hostility or discrimination toward any', (2) 'to exercise its discretion with complete good faith and honesty', and (3) 'to avoid arbitrary conduct'." *See Goolsby*, 419 Mich. at 664, 358 N.W.2d at 863 (quoting *Vaca*, 386 U.S. at 177, 87 S.Ct. at 909). A union's failure to comply with any one of the three responsibilities constitutes a breach of its duty of fair representation. *Id.*

The general question facing the Court in *Goolsby* has a superficial similarity to the issue facing our Court—absent improper motive, when does a union's unexplained failure to act constitute a breach of its duty of fair representation? In *Goolsby*, the union failed to follow through on grievance proceedings brought on behalf of a group of its members. This failure to further process the grievance was without explanation but there

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[5] The union was granted this authority by the Public Employment Relations Act, Mich.Comp. Laws § 423.211 (1978), which provides in pertinent part:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. . . .

was no evidence of bad faith on the part of the union. The question facing the Court was whether this unexplained failure to act met the third prong of the *Vaca* standard which prohibits arbitrary conduct.

The *Goolsby* Court held that a union's unexplained failure to process the grievances of its members could constitute arbitrary conduct sufficient to meet the third prong of the test. *See* 419 Mich. at 679, 358 N.W.2d at 870. The Court further held that no bad faith on the part of the union was necessary to meet the third prong of the test.

[4] The question presented in this case differs in one significant respect from that presented in *Goolsby*. In our case, the District Court held that the union's failure to act forcefully on behalf of its members in response to threatened layoffs constituted a breach of the duty of fair representation. The union's duty to process grievances on behalf of its members, which was at issue in *Goolsby*, is an essential linchpin of the collective bargaining process. In our case, under Michigan law, a public employer's initial decision to lay off is a permissive subject of bargaining. *Local 1277, AFSCME v. City of Center Line*, 414 Mich. 642, 665, 327 N.W.2d 822, 831-32 (1982). Therefore, the union had no mandatory duty to act on behalf of its members in response to the threatened layoffs.[6] Absent a duty to act, failure to act forcefully does not breach the union's duty of fair representation. *See e.g.* B. Gorman, *Basic Text on Labor Law* 706 (1976).

This does not mean that other circumstances may not arise which would create a duty on the part of the union to bargain against threatened layoffs. For example, if federal or state law prohibited the layoffs, or if the voluntary affirmative action plan or the collective bargaining agreement did not permit the layoffs, then the union may have had a duty to bargain against them. In the context of this case, however, we have held that the District

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[6] The union remains under a duty to bargain over the impact of the layoff decision on workload and safety. *See Center Line*, 414 Mich. at 661-66, 327 N.W.2d at 830-32. None the less, this is not an issue in this case.

Court erred in applying principles of collateral estoppel to create a constitutional obligation on the part of the City to avoid these layoffs. Moreover, the voluntary affirmative action plan did not address layoffs, and the collective bargaining contract between the parties expressly provided for layoffs to be made strictly on the basis of reverse seniority. The District Court specifically found the seniority provision to be bona fide. *NAACP v. DPOA*, 591 F.Supp. at 1219. For these reasons, based upon the facts set forth in the District Court's opinion, the union was under no special obligation to bargain against these layoffs.

The failure to bargain against layoffs could also have been found to be evidence of bad faith or discrimination on the part of the union. However, the District Court did not find that the union was improperly motivated in its reaction to the threatened layoffs. Rather, the District Court held that the union's failure to act *alone* constituted a breach of the duty of fair representation. Absent a finding of intentional discrimination or other improper motivation, the union's mere failure to bargain forcefully enough in a permissible context does not by itself constitute bad faith or discrimination.

The plaintiffs also allege that the union violated 42 U.S.C. § 1981. The District Court did not address this issue. Accordingly, we reverse the District Court's injunctive orders against the City and the union and remand for further proceedings consistent with this opinion.

Opinion

NAACP, DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John Hawkins; Helen Poelinitz, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider; President of the DPOA; City of Detroit, a Michigan Municipal Corporation; Mayor Coleman A. Young; Detroit Police Department; Board of Police Commissioners; Chief William Hait, Governor William Milliken; and the Michigan Employment Relations Commission, Defendants.

No. 80-73693-DT.

United States District Court,
E.D. Michigan, S.D.

Jan. 13, 1988.

Black police officers brought action against city and union in which it was alleged that city violated affirmative duties imposed by previous approval of city's voluntary affirmative action plan and that union breached duty of fair representation. The United States District Court for the Eastern District of Michigan, 591 F.Supp. 1194, enjoined city from laying off police officers and found that union had breached duty of fair representation to black members, and appeal was taken. The Court of Appeals, Merritt, Circuit Judge, 821 F.2d 328, reversed and remanded. On remand, the District Court, Gilmore, J., held that: (1) officers could not maintain § 1983 action against union; (2) officers could maintain § 1983 action against city; and (3) union's motion for summary judgment on § 1981 claim was without merit.

Ordered accordingly.

Opinion

1. Civil Rights—13.5(4)

Dismissal of black police officers' § 1983 action against police officers association was required; actions of association did not constitute state action. 42 U.S.C.A. § 1983.

2. Courts—99(1)

Under doctrine of "law of the case," decision on issue of law made at one stage of case becomes binding precedent to be followed in successive stages of same litigation; like stare decisis, it protects against relitigation of settled issues and assures obedience of inferior courts to decision of superior courts.

See publication Words and Phrases for other judicial constructions and definitions.

3. Courts—99(1)

After law of the case is determined by superior court, inferior court lacks authority to depart from it.

4. Limitation of Actions—58(1)

Black police officers' § 1983 action against city was not barred under state's three-year statute of limitations period which governed claims of general injuries to person; findings of fact from prior opinion, concerning events within statute of limitations, provided evidence that race was motivating factor in city's recent actions to lay off black police officers. 42 U.S.C.A. § 1983; M.C.L.A. § 600.5805(8).

5. Courts—99(1)

Black police officers were entitled to maintain § 1981 claim against union despite fact that in original opinion, district court noted that no one had previously brought action against union in which union was found guilty of intentional racial discrimination; court had previously found that union had history of racial hostility and indifference to rights and needs of black officers,

that there was absence of black representation at leadership levels of union, and that union did not respond aggressively to layoffs of black officers. 42 U.S.C.A. § 1981.

6. Civil Rights—13.10

Evidentiary hearing was necessary to determine whether employment discrimination action against city and police union was moot as city allegedly recalled discharged black police officers and majority of membership of union was now made up of minorities.

Thomas Atkins, Brooklyn, N.Y., Barnhart and Mirer by Jeanne Mirer, Gary Benjamin, James W. McGinnis, Detroit, Mich., for plaintiffs.

Walter S. Nussbaum, Farmington Hills, Mich., for defendants Detroit Police Officers Ass'n, David Schneider, President of DPOA.

Frank W. Jackson, Asst. Corp. Counsel, Detroit, Mich., Daniel B. Edelman, Washington, D.C., Terri L. Hayles, Asst. Corp. Counsel, Detroit, Mich., for defendants City of Detroit, Mayor Coleman A. Young, Detroit Police Dept., Bd. of Police Com'rs, Chief William Hart.

OPINION

GILMORE, District Judge.

This matter is before the Court upon remand from the Court of Appeals.[1] Before the Court are two motions; defendant City of Detroit's (City) motion for entry of judgment, and DPOA's motion for summary judgment concerning the 42 U.S.C. §§ 1981 and 1983 claims.

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[1] This Court's original opinion is found at 591 F.Supp. 1194 (E.D.Mich. 1984), and the Court of Appeals' opinion is found at 821 F.2d 328 (6th Cir.1987).

Opinion

For the reasons set forth below, the Court will deny both motions, except for the section 1983 claim against the DPOA. This leaves the Court with the much more difficult question of whether the entire matter is moot. A discussion of that issue is found in part IV of this opinion.

The issue for determination in the City's motion for entry of judgment is whether the Sixth Circuit's mandate forbids any retrial of liability issues and requires the entry of judgment for the City.

[1] With reference to the DPOA, the Sixth Circuit reversed the judgment of this Court finding a breach of the duty of fair representation and remanded it to this Court to address the 42 U.S.C. § 1981 claim. The issue here is whether this Court is foreclosed from considering the section 1981 claim in light of its findings on the breach of the duty of fair representation. The DPOA also seeks summary judgment on the 42 U.S.C. § 1983 claim not addressed by this Court or the Sixth Circuit. The Court grants this summary judgment because the actions of the DPOA do not constitute state action.

I

[2,3] The Court must first consider what authority it has to act under the opinion and mandate of the Sixth Circuit. This requires a consideration of the doctrine of the "law of the case." Under that doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. Like stare decisis, it serves the dual purpose of: (1) protection against the re-litigation of settled issues; and (2) assuring the obedience of inferior courts to the decision of superior courts. After the law of the case is determined by a superior court, the inferior court lacks authority to depart from it. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404(1), at 118 (2d ed. 1984) (hereinafter *Moore's*).

According to *Moore's*, the decision of an appellate court on an issue of law becomes the law of the case on remand. "The district court owes obedience to the mandate of the supreme court or the court of appeals, and must carry it into effect according to its terms." *Id.* ¶ 0.404(10), at 170 (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895)).

What remains within the power of the district court after remand depends upon the scope of the mandate. When further proceedings are specified in the mandate, the district court is limited to holding such as directed:

> When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate.
>
> In the case of a remand for further proceedings, the mandate constitutes the law of the case only on such issues of law as were actually considered and decided by the appellate court, or necessarily inferred by the disposition on appeal. In the course of subsequent proceedings directed or permitted by the mandate, the district court otherwise will apply the law as it reads it, subject to correction on a second appeal.

Id. at 172-74.

Courts have also held that, upon remand, a trial court may consider "those issues not expressly or implicitly disposed of by the appellate decision." *See, e.g., Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir.1985). *See also Quern, v. Jordan*, 440 U.S. 332, 347 n. 18, 99 S.Ct. 1139, 1148 n. 18, 59 L.Ed.2d 358 (1979).

"A trial court is thereby free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision. *Id.*" Moreover, "[t]he mere fact that it could have been decided [by the appeals court] is not sufficient to foreclose

the issue on remand." *Maggard v. O'Connell*, 703 F.2d 1284, 1289 (D.C.Cir.1983).

A general rule has been provided by the Third Circuit in *Bankers Trust, supra:*

> [U]pon a reversal and remand for further consistent proceedings, the case goes back to the trial court and there stands for a new determination of the issues presented as though they had not been determined before, pursuant to the principles of law enunciated in the appellate opinion, which must be taken as the law of the case.

761 R.2d at 950 (citing *United States v. Iriarte*, 166 F.2d 800, 803 (1st Cir.), *cert. denied*, 335 U.S. 816, 69 S.Ct. 36, 93 L.Ed. 371 (1948)).

It therefore becomes essential to consider what was actually considered and disposed of by the Sixth Circuit, or necessarily to be inferred from the disposition.

II

The Sixth Circuit stated that in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.) (*Bratton I*), *modified*, 712 F.2d 222 (6th Cir.1983), (*Bratton II*), *aff'g Baker v. City of Detroit*, 504 F.Supp. 841 (E.D.Mich.1980), *modifying* 483 F.Supp. 930 (E.D.Mich.1979), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), it upheld a voluntary affirmative action plan providing for the promotion of a black sergeant to every second job opening for lieutenant in the Detroit Police Department. The court noted that, although it held that the factual and legal basis for the promotional plan was sufficient to justify the City in adopting the plan voluntarily, it "specifically and expressly reversed the District Court order which made the plan mandatory." *NAACP v. DPOA*, 821 F.2d at 330 (citing *Bratton II*, 712 F.2d at 223).

The Sixth Circuit noted that this Court, in applying the doctrine of collateral estoppel, held that the *Bratton* decision

foreclosed further litigation on the issue of prior discrimination in the police department, and "leads to the conclusion that the City could not lay off any police officers as part of a planned reduction in force." 821 F.2d at 330. According to the Sixth Circuit, the "net effect of [this Court's] order is to mandate that the City may not reduce the staffing and budgetary level of the police department in effect at the time of the order without prior permission of the Court." *Id.*

The Sixth Circuit held that this Court properly invoked the doctrine of collateral estoppel to preclude the City from denying the facts of prior discrimination that it had earlier demonstrated and conceded. It held, however, that "it was incorrect for the District Court to then rely upon these findings as the *sole basis* for making a very significant modification to the voluntary plan by disallowing any further layoffs until the goals of the plan are met." *Id.* at 331 (emphasis added). The court stated that in *Bratton* it merely recognized that the City's voluntary affirmative action plan, based on the City's own determination that it had discriminated in the past, was constitutionally permissible, which is "a different issue from whether a constitutional violation has occurred which mandates a court-ordered remedy." *Id.* (citing *Bratton II*, 712 F.2d at 223; *Bratton I*, 704 F.2d at 902).

In sum, the Sixth Circuit stated that this Court erred by relying "solely on the *Bratton* findings and conclusions to set aside the reverse seniority provision of the collective bargaining agreement." *Id.* It was concerned about the impact this decision would have on future employers' decisions to set up voluntary affirmative action plans, and held that judicial approval of a voluntary affirmative action plan does not create a contract of permanent employment, or invalidate or modify a collective bargaining agreement providing for layoffs on the basis of seniority. With reference to the City, the Sixth Circuit merely stated: "[W]e reverse the district court's injunctive orders against the City and the union, and remand for further proceedings consistent with this opinion." 821 F.2d at 333.

The Sixth Circuit held that remedial orders of this Court could not be bottomed *solely* on the *Baker/Bratton* findings. Effectively, to allow the voluntary affirmative action program to become mandatory based upon the same evidence that was presented merely to deem the program constitutional would be going too far. It did not find, however, that no evidence of unconstitutional conduct could be presented that could support the imposition of remedial orders by this Court.

In accordance with the general rule of *Bankers Trust, supra*, upon remand a trial court may consider "those issues not expressly or implicitly disposed of by the appellate decision." The trial court must redetermine the issues "presented as though they had not been determined before, pursuant to the principles enunciated in the appellate opinion."

It should be noted that in this case plaintiffs originally brought suit against the City under the Fourteenth Amendment, the Thirteenth Amendment, 42 U.S.C. §§ 1981, 1983, and 1985(3). This Court bottomed its determination of liability on the Fourteenth Amendment, relying primarily upon *Baker/ Bratton*, dismissed the section 1985(3) claim, and did not address the Thirteenth Amendment claim or the sections 1981 and 1983 claims.

It therefore appears that, upon remand based upon the *Bankers Trust* general rule, and considering the narrow and very specific basis of the Sixth Circuit for reversal—namely, this Court's reliance on *Baker/Bratton* as the sole basis for decision—if otherwise applicable and relevant, the Court can consider other claims, providing that consideration is based on something other than the findings and conclusions of *Baker/Bratton*.

It appears, however, that there is no basis for consideration of several of these claims. The Court finds no basis in the record for the Thirteenth Amendment claim and will not consider it. Nor will this Court consider the section 1981 claim because, if there is a claim under the Civil Rights Act, it is based on section 1983 in view of the fact that state action is involved here.

With reference to the Fourteenth Amendment claim, the Court concludes that, in light of *Thomas v. Shipka*, 818 F.2d 496 (6th Cir.1987), plaintiffs may not pursue a Fourteenth Amendment claim. *Thomas* held that, where a plaintiff states a constitutional claim under 42 U.S.C. § 1983, that statute is the exclusive remedy for the alleged constitutional violation, and a direct claim under the Constitution cannot also be asserted. 818 F.2d at 500, 503.

Thomas involved a civil rights action brought by a former employee of the municipal court against the clerk of the court. Plaintiff alleged she had been wrongfully discharged because of her political party affiliations in violation of section 1983 and the First and Fourteenth Amendments. Noting that "[T]he Supreme Court has never recognized a cause of action arising directly under the Constitution in a case where section 1983 was available as a remedy," the Court dismissed the constitutional claim. It concluded: "[I]t is unnecessary and needlessly redundant to apply a cause of action arising directly under the constitution where Congress has already provided a statutory remedy of equal effectiveness through which the plaintiff could have vindicated her constitutional rights." *Id.* at 500.

[4] It thus appears that the present case against the city must be evaluated as a section 1983 action.[2] The city, however,

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[2] This Court recognizes that the Supreme Court has decided cases involving affirmative action and racial discrimination under solely the Fourteenth Amendment, even though the cases theoretically could have been brought under section 1983. *See e.g., United States v. Paradise*, — U.S. —, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (allowed Fourteenth Amendment action in case involving long-standing practice of the Alabama Department of Public Safety of excluding blacks from employment); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2982, 61 L.Ed.2d 666 (1979) (involved racial discrimination by the Columbus Board of Education in which the Court recognized a Fourteenth Amendment cause of action); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (Court considered Fourteenth Amendment violations due to allegedly racially discriminatory rezoning in the village of Arlington Heights). However,

asserts that such an action is time-barred in light of *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1988, 85 L.Ed.3d 354 (1985).

Wilson held that all claims under section 1983 are governed by the state limitation period applicable to personal injury actions. As applied to claims in Michigan, *Wilson* provides that sections 1981 and 1983 claims will be governed by M.C.L.A. § 600.5805(8), the three year period governing claims of general injuries to the person. *See Garland v. Shapiro*, 579 F.Supp. 858, 859 (E.D. Mich.1984). Hence, asserts the City, given that the suit began in 1980, the section 1983 action is time-barred to the extent that the claim arises from the City's pre-1967 intentional discrimination.

This Court is unwilling to recognize that the section 1983 claim is time-barred. First, assuming that *Thomas* applied and that plaintiffs can now only proceed under section 1983, this Court made specific findings of fact with regards to the City above and beyond the Court's acceptance of the *Baker/Bratton* findings.

This Court found that on December 31, 1978, blacks held 1719 of 4393 positions in the rank of police officer, or 89.1 percent, and 1946 of the total of 5630 positions in the department, or a total of 84.6 percent. "This figure represents the highest percent of blacks ever in the Detroit Police Department." 591 F.Supp. at 1197. On February 23, 1984, when this Court issued its partial summary judgment ruling, the Detroit Police Department had a total sworn personnel of 3762, of which 1007, or 26 percent, were black. It had a total of 2668 police officers, of whom 756, or 28 percent, were black. "Thus, it is clear that the net effect of the layoffs in 1979 and 1980 was to wipe out most of the affirmative action recruiting that had brought large numbers of blacks onto the police force in 1977 and 1978." *Id.*

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because the Sixth Circuit language in *Thomas* is clear, and because plaintiffs could obtain no greater relief under the Fourteenth Amendment than they could under section 1983, this Court will not consider the Fourteenth Amendment claim any further.

This Court also noted the testimony of Dr. Mark Bendick, Jr., an economist who updated the statistical figures established by Allen Fechter in *Baker*:

> Dr. Bendick made a projection for 1988, and indicated that, if the Detroit Police Department had hired blacks in proportion to the labor market representation in all of the years from 1945 to 1978, the presence of black officers in 1988 would be 50.5 percent. As of 1984, blacks comprised 65 percent of the relevant labor market, and the City of Detroit is 67 percent black.

Id. at 1198. Furthermore, Dr. Bendick also testified that the statistical shortfalls of blacks in the Detroit Police Department over the years, up to the early 1970's, could only be explained as the result of racial discrimination. *Id*, at 1200.

"Although in 1978, the year before the layoffs involved in this case took place, 89 percent of Detroit Police Officers were black, the highest percentage ever, blacks still represented a 62.3 percent of the relevant labor market." *Id.* At the time of the 1984 decision, the "percentage of black representation in the ranks of police officers [was] 28.3 percent, and in all ranks 27.9 percent. The relevant labor market in the City of Detroit . . . [was] well over 65 percent." *Id.*

The September 3 letter of Mayor Young to David Watroba (former president of DPOA) shows that "the City knew that it was under a legal mandate to continue its affirmative obligation to plaintiffs, and knew that the layoffs would have a drastic effect upon this obligation." *See* 591 F.Supp. at 1201 (quotes portion of letter).

Moreover, it was obvious from "the testimony and the exhibits that in 1979, and more particularly in 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than face a lawsuit by white police officers." *Id.* at 1202.

With regards to the remedy, this Court found, based on the testimony of Chief William Bracey, former Chief of Patrol of the New York City Police Department "that in addition to the usual losses sustained with the loss of employment, the class of black officers suffered injury as a direct result of the City's past racial discrimination, and its failure in 1979 and 1980 to continue to remedy this discrimination. To put it bluntly—they suffered the trauma of betrayal." *Id.* at 1204.

Numerous police officials testified concerning the impact of the layoffs to the police and the community:

> Although the presence of many black command officers, who were unaffected by the layoffs, somewhat ameliorates this problem, it is undisputed that black patrol officers are the most visible, have the most daily contacts with the community, and are most important in crime prevention and community relations. Therefore, massive reductions in the numbers of black police officers below the rank of sergeant on the street will have dramatic effects.
>
> Thus, the City is in real danger of seeing the gains of the 1970's in terms of police-community cooperation reversed, if the City's unconstitutional layoffs are not remedied.
>
> It is clear from the testimony of Mayor Young and the police experts, Bracey, Hart, Bannon, Murphy, and the exhibits, that the return of black officers to the streets of the City of Detroit is not only necessary to vindicate the constitutional rights of the black police officers, but is also an absolute necessity to restore balance to the community, and the confidence of the community in the Detroit Police Department. Their testimony was intelligent, credible and convincing, and clearly established the need for the return to the force of the black police officers.

Id. at 1206-07.

The City argues, however, that in this case there is no contention that the City acted with racial animus in making the 1979 and 1980 layoffs, and that this Court has specifically found that it did not. Therefore, the City asserts that discriminatory action did not occur within the limitations period. To support this contention, the City quotes the Court's opinion: "This Court does not ascribe racially discriminatory animus to Mayor Young and his administration." 591 F.Supp. at 1202. Even though this Court does not ascribe racial animus to the Mayor and his administration, the fact remains that the Mayor made a conscious choice to face a lawsuit from black officers rather than from white officers, and did effectuate layoffs that drastically reduced the minority representation of the Detroit Police Department well below the proportion of the black population of the City. This Court's earlier findings show that race was a motivating factor in the City's action to layoff black officers:

> However, it is equally obvious from the testimony and exhibits that in 1979, and more particularly in 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than face a lawsuit by white officers. It also decided that it would threaten layoffs of black officers as a club against the DPOA in an attempt to roll back the 1978 Act 312 arbitration award, especially the retroactive pay and COLA increases ordered in the award.

It is not the function of this Court to inquire into the political wisdom of these decisions. However, the Constitution, and particularly the Fourteenth Amendment, exists precisely to insure that the individual and group rights of all individuals, especially minorities, who have been historically shut out of the political process, are protected in the political process.

The rights of the black police officers and black citizens of Detroit to a fully integrated police force were sacrificed in the 1979 and 1980 layoffs. A city does not fulfill its obligations under the Fourteenth Amendment ... by simply giving the

difficult problem of redressing racial injustice in our society to the federal courts.

Id. at 1202 (footnote omitted).

Thus, even though the Court ascribed no racial animus to the Young administration, the facts are that sufficient findings exist indicating racial discrimination to defeat a motion for entry of judgment. We are not here on a full trial on the issue of violation of section 1983, but only on the question of whether a sufficient factual basis exists to withstand a motion for entry of an order of dismissal.

The findings of fact from this Court's prior opinion provide evidence that race was a motivating factor in the City's actions to layoff the black officers. All of these findings concern events within the statute of limitations that is, events occurring after 1977. Therefore plaintiffs' section 1983 claim is not time-barred, and can be considered under the terms of the mandate of the Sixth Circuit. Additionally, evidence can be presented of events prior to 1977 to the extent that the earlier occurrences impact upon the post-1977 events.

It is therefore clear that the City's motion for entry of judgment must be denied. Plaintiffs have represented they will demonstrate that "wholly apart from *Baker/Bratton* the evidence of record . . . dictates a finding that the City's prior unconstitutional behavior was a continuing and proximate cause of the illegal layoffs of 1979 and 1980." Assuming that the issues in this case are not moot, plaintiffs should be given the opportunity to present this evidence.

III

The Court of Appeals disposition with reference to the DPOA was very specific. It reversed this Court's finding that the DPOA breached its duty of fair representation, and said:

> The plaintiffs also allege that the union violated 42 U.S.C. § 1981. The district court did not address this issue. Accordingly, we reverse the district court's injunctive orders against the City and the union, and remand for further proceedings consistent with this opinion.

821 F.2d at 333.

The DPOA contends that all that remains for consideration pursuant to the remand order are the sections 1981 and 1983 claims.[3] As stated in the introduction to this opinion, it is obvious that the section 1983 claim must be dismissed because there is no state action by the DPOA. Therefore, the Court needs only to address the section 1981 claim.

[5] It is the position of the DPOA that, to prevail on the section 1981 claim, the plaintiff must present evidence of defendant's specific discriminatory intent because section 1981 reaches only purposeful discrimination. It argues that, because there was no finding by this Court in its original opinion of intentional discrimination by the DPOA, the Court should grant summary judgment on the section 1981 claim, and dismiss the action against the DPOA.

The Court disagrees. As pointed out by plaintiffs, it is impossible to fairly read this Court's findings concerning the DPOA's history and conduct before, during, and after the 1979 and 1980 layoffs without concluding that the DPOA was indeed

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[3] The plaintiffs originally brought suit against the DPOA based upon the Thirteenth Amendment, 42 U.S.C §§ 1981, 1983, and 1985(3), and a pendent state claim for breach of the duty of fair representation. In its earlier opinion, the Court dismissed the section 1985(3) and the Thirteenth Amendment claims. This Court did not address the section 1983 claim.

guilty of intentional discrimination. This Court made five major findings in its opinion.

It first found a history of racial hostility and indifference to the rights and needs of black officers. "Witness after witness, all black and all police officers or sergeants, testified to the discriminatory manner in which they were treated by the DPOA." 591 F.Supp. at 1213.

Second, the Court found a total absence of black representation at the leadership levels of the DPOA. As of the time of this Court's opinion in 1984, no black had ever been elected to one of the top officer positions, only two blacks had served on the executive board, and no black member had ever served on the negotiating committee. This Court specifically rejected the DPOA's reason for not putting blacks on this committee, namely that there were not sufficient "trustworthy" blacks to fill the positions using the union's criteria of political patronage. 591 F.Supp. at 1214.

Third, through the recitation of the negotiating history, the Court established the perfunctory behavior on the part of the DPOA when the City eliminated one-half of the blacks from the force. This Court in its earlier opinion clearly questioned why the union responded in a totally routine manner to the layoffs of one-quarter of the DPOA members at a dramatic loss of overall dues income to the union. 591 F.Supp. 1214-18.

Fourth, the Court noted the DPOA's present-day failure in 1984 to make any serious efforts to assist the black officers. It stated:

> The actual fact is that the union, even in its 1983 demands, evinced no real interest in getting black laid-off police officers back to work. Again, given the DPOA's history, this Court cannot believe that this behavior would be the same if one-half of its white membership was laid off.

591 F.Supp. at 1218.

Finally, this Court noted the DPOA's history of concessions and prompt union action to avert layoffs in 1975 and 1981, when the jobs of white officers were at stake. Comparing these layoffs with the 1979 and 1980 layoffs of the black officers, this Court noted that, in the layoffs of the white officers, the DPOA did something, whereas with the black officers it did nothing. The Court concluded by stating:

> Thus, this Court is not concerned with any reasonable activity of the DPOA in collective bargaining, even certain activity which sacrifices the interests of minorities for the majority. This Court is only concerned with activity that is arbitrary, *racially discriminatory*, and not in good faith. And this Court finds that, in its representation of its black members, the DPOA's perfunctory and passive behavior in 1979 and 1980 breached the duty of fair representation.

591 F.Supp. at 1219 (emphasis added).

These findings contradict the DPOA's assertion that the court found as a matter of fact that there had been no discrimination in the layoff negotiations.

Furthermore, this Court's findings with respect to the violation of the duty of fair representation were tantamount to a finding of intentional discrimination under 42 U.S.C. § 1981 when it awarded attorney fees and costs against the DPOA. *See NAACP v. DPOA*, 620 F.Supp. 1173 (E.D.Mich.1985), *rev'd*, 819 F.2d 1142 (6th Cir. 1987). In granting attorney fees to plaintiff's attorneys, this Court held:

> The Court did not reach plaintiff's claim under § 1981 because that claim was mooted by the finding of the breach of duty of fair representation. Plaintiff's § 1981 claim and duty of fair representation claim arose out of a common nucleus of operative facts, i.e. the DPOA's action *as a whole* with regard to the 1979 and 1980 layoffs of black officers.

Id. at 1180 (emphasis in original).

Furthermore, this Court cannot overlook the recent Supreme Court case of *Goodman v. Lukens Steel Co.*,—U.S.—, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), decided a week after the Sixth Circuit issued its opinion in this case. This opinion also favors denial of the DPOA's motion for summary judgment. At issue in *Lukens* were findings of racial discrimination and harassment by Lukens Steel against its black employees, and findings that the union had correspondingly failed to comply with the statutory and contractual duties to defend its black members in challenging the company's discriminatory practices. The union was found not guilty of having racial animus against blacks generally, but those acts of omissions which were racially motivated were found to violate section 1981 in much the same way as racially motivated or racially charged acts of commission:

> As we understand it, there was no suggestions below that the unions held any racial animus against or denigrated blacks generally. Rather, it was held that a collective bargaining agent could not, without violating Title VII and section 1981, follow a policy of refusing to file grievable racial discrimination claims however strong they might be and however sure the agent was that the employer was discriminating against blacks. The unions, in effect, categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks, knowing that the employer was discriminating in violation of the contract. Such conduct, the courts below concluded, intentionally discriminated against blacks for seeking a remedy for disparate treatment based on their race, and violated both Title VII and section 1981. As the district court said, "a union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and section 1981, regardless of whether, as a subjective matter, its leaders were favorably

> disposed towards minorities." 580 F.Supp. [1114] at 1160 [ED Pa.1984].
>
> The courts below, in our view, properly construed and applied Title VII and section 1981. Those provisions do not permit a union to refuse to file any and all grievances presented by a black person on the ground that the employer looks with disfavor on and resents such grievances. It is no less violative of these laws for a union to pursue a policy of rejecting disparate treatment grievances presented by blacks because the claims assert racial bias and would be very troublesome to process.

Id.—U.S. at —, 107 S. Ct. at 2625, 96 L.Ed.2d at 586-87.

Because the central premise of the DPOA motion, that this Court did not find intentional discrimination by the DPOA in its earlier opinion, is erroneous, the DPOA's motion for summary judgment under section 1981 must be denied. In its earlier opinion, this Court did not rule that no intentional discrimination occurred, only that nobody previously brought a lawsuit against the DPOA, or that involved the DPOA, in which the DPOA was found guilty of intentional racial discrimination. This does not mean that the DPOA had not discriminated in the past, nor does it mean that the DPOA did not intentionally discriminate against blacks with respect to the layoff negotiations in 1979 and 1980.

It is true that the Sixth Circuit stated that this Court did not make a specific and explicit finding of intentional discrimination, but it did not state this Court did not make findings that could rise to the level of intentional discrimination. The Sixth Circuit seems to suggest that enough evidence existed to make the finding of intentional discrimination, yet it had to recognize that the Court did not make its ruling based on that explicit finding.

It is clear that abundant evidence exists in this Court's 1984 decision regarding the DPOA's intentional discrimination. Because this Court did not bottom its decision on this basis, the Sixth Circuit felt compelled to reverse. This does not mean that evidence of intentional discrimination does not exist.

For the foregoing reasons, the motion for summary judgment on section 1981 will be denied, and the motion on section 1983 will be granted.

IV

This Court thus finds that the City's motion to dismiss the section 1983 claim and the DPOA's motion for summary judgment on the section 1981 claim are without merit. Nevertheless, the Court must consider a more serious question—that of mootness. Defendants have represented to the Court that the remedies ordered in its prior judgment against the City of Detroit have been complied with in that the City has recalled all of the discharged black police officers, and has hired additional black officers to the Detroit Police Department. With reference to the DPOA, defendants have represented that a majority of the membership of the DPOA is now made up of minorities and that, therefore, any order requiring minority representation at the various levels of the DPOA is moot, in that minorities, through intra-union political action, can protect themselves.

[6] These issues are of great concern to the Court. First, there are factual issues that must be determined. The representations made to the Court by counsel do not constitute a factual determination unless there can be a stipulation of facts by all sides. Secondly, the legal import of these facts, if they are established, is also of significance. If they are established, does that preclude this Court's jurisdiction under Article III under which the Court may consider only an actual case or controversy? To resolve these issues, the Court will schedule a hearing for the purpose of establishing a factual basis, and for dealing with the legal issues involved if the facts as alleged are true.

A hearing on the factual issues as to mootness and the legal effect thereof will be held on Wednesday, February 17, 1988, at 2:00 p.m. Plaintiffs' brief shall be filed by February 1, 1988. Responsive briefs shall be filed by February 12, 1988.

An order in compliance herewith may be presented.

Opinion

NAACP, DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randolph; Betty T. Roland; Grant Battle; Cynthia Cheatom; Evin Fobbe; John Hawkins; Helen Poelinitz, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); Thomas Schneider, President of the DPOA; City of Detroit, a Michigan Municipal Corporation, Mayor Coleman A. Young; Detroit, Police Department; Board of Police Commissioners; Chief William Hart; Governor William Milliken; and The Michigan Employment Relations Commission, Defendants.

No. 80-73693-DT.

United States District Court,
E.D. Michigan, S.D.

June 15, 1988.

Court raised issue of mootness in civil rights action that had been brought against city and city police association. The District Court, Gilmore, J., held that the action was moot as to both city and association.

Action dismissed.

1. Federal Courts—13.10

Civil rights action brought against city was moot, where all officers that court had ordered recalled were recalled and had been given their full seniority rights under contract between police association and city, seniority rights of recalled officers were fully protected under collective bargaining agreement, there was no showing that seniority rights of any recalled officer had ever actually been threatened, and recalled officers would have clear remedy under contract grievance procedure if such rights were threatened, and accordingly, plaintiffs were not

entitled to entry of consent decree accepting seniority list published by city as contractually binding on status of recalled officers. 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Courts—13.10

Civil rights action was moot as to city police association; court's principal concern at time of its earlier opinions was that black members of association be given their proper representation in leadership structure so that they could protect their rights at time when black members were the minority, but since time of earlier opinion, racial composition of city police department had changed, and majority of association membership was made up of blacks and other minorities. 42 U.S.C.A. §§ 1981, 1983; U.S.C.A. Const. Art. 3, § 1 et seq.

Walter S. Nussbaum, Farmington Hills, Mich., on behalf of defendants Detroit Police Officers Ass'n David Schneider, President of DPOA.

Frank W. Jackson, Asst. Corp. Counsel, Detroit, Mich., Daniel B. Edelman, Washington, D.C., Terri L. Hayles, Asst. Corp. Counsel, Detroit, Mich., on behalf of defendants City of Detroit, Mayor Coleman A. Young, Detroit Police Dept., Bd. of Police Com'rs and Chief William Hart.

Thomas Atkins, Brooklyn, N.Y., Barnhart and Mirer by Jeanne Mirer, James W. McGinnis, Detroit, Mich., on behalf of plaintiffs.

OPINION

GILMORE, District Judge.

In its most recent opinion in this case,[1] this Court held, on remand from the Court of Appeals, 821 F.2d 328, that plaintiff

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[1] *See NAACP v. DPOA*, 676 F.Supp. 790 (E.D. Mich.1988).

could maintain an action under 42 U.S.C. § 1983 against defendant City of Detroit (City), and that the defendant Detroit Police Officers Association's (DPOA) motion for summary judgment on a claim under 42 U.S.C. § 1981 was without merit. The Court, however, raised the question of mootness, and ordered a further hearing to determine whether the case is moot so as to preclude this Court's jurisdiction under Article III because of the lack of an actual case or controversy.[2]

I

The remand hearing ordered by the Court in its opinion of January 13, 1988[3] was held on May 4, 1988. At that hearing, all parties stipulated that there has been a full recall, or an offer of recall, with protection of full seniority, for all officers laid off in 1979 and 1980. Thus, there has been full compliance with this Court's order contained in its earlier opinion.[4]

It was also stipulated by all parties that, as of February 17, 1988, 51.3 percent of the membership of the DPOA was black, and that, in addition, there were 64 other members of the DPOA who were in a protected class. The parties further stipulated that 70 per cent of all new officers hired after all of those ordered returned to the police force by this Court's previous order were black. In addition, it was agreed that the City had hired 1,290 officers hired subsequent to the completion of the recall in June 1985.

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[2] There is no claim for damages against either the City or the DPOA under §§ 1981 or 1983. The only relief sought in this case on remand from the Court of Appeals is injunctive relief.

[3] *See* 676 F.Supp. at 799.

[4] The Court's earlier opinion on this matter is found at 591 F.Supp.1194 (E.D.Mich.1984).

II

In making a determination as to whether or not the case is presently moot, this Court must consider whether there has been full compliance with this Court's order contained in its earlier opinion.[5] With reference to the City, the question is whether all of the officers laid off in 1979 and 1980 have been offered recall, and whether the racial composition of the police force is now equivalent to the relevant labor market. The only part of this Court's order that remained pending against the City prior to the action of the Court of Appeals[6] reversing and remanding this case was an order requiring this Court's approval before the lay-off, suspension, or discharge of any police officer, except for disciplinary reasons. With reference to the DPOA, this Court's prior order required reasonable representation of blacks in the leadership structure of the DPOA within 12 months. The Court's specific concern with reference to the DPOA was that "[B]lack members of the DPOA are given their proper representation in the leadership structure of the DPOA, [so] they can, in the future, protect minority members against a breach of the duty of fair representation by the Union. It is this goal that this Court seeks." 591 F.Supp. at 1220.

III

The concept of mootness goes to the fundamental idea that Article III courts may decide only actual "cases or controversies." As the Supreme Court stated in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1987):

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties

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[5] 591 F.Supp. at 1220-21.

[6] *NAACP v. DPOA*, 821 F.2d 328 (6th Cir.1987).

> having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 240-41, 57 S.Ct. at 464 (citations omitted).

A case can become moot because the law has changed,[7] because a defendant has paid monies owed and no longer wants to appeal,[8] because the allegedly wrongful behavior has passed, been mooted, or could not be reasonably expected to occur.[9]

The Supreme Court has created various exceptions to the rule to prevent either party from creating a technical mootness as a sham to deprive the Court of jurisdiction. For example, if a party voluntarily stops allegedly illegal conduct, that change does not necessarily make the case moot, for the defendant would then be free to return to his old ways. Defendant must show that "there is no reasonable expectation that the wrong will be repeated." *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)).

Another exception is the "capable of repetition yet evading review" doctrine. A mere "physical or theoretical possibility" is not enough to meet this test, otherwise "virtually any matter of short duration would be reviewable." There must be a "reasonable expectation" or a "demonstrable possibility" that "the same controversy will reoccur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183-84, 71 L.Ed.2d 353 (1982).

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[7] *See, e.g., United States v. Alaska S.S. Co.*, 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808 (1920).

[8] *See, e.g., California v. San Pablo & Tulore R.R.*, 149 U.S. 308, 313-14, 13 S.Ct. 876, 878, 37 L.Ed. 747 (1893).

[9] *See, e.g., SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972).

The Sixth Circuit recently dealt with mootness in *Berry v. School District of the City of Benton Harbor*, 801 F.2d 872 (6th Cir. 1986). In *Berry*, the court held moot a claim for injunctive relief governing layoffs where no actual layoff was contemplated. The court pointed out that "[w]ithout knowing the facts of the particular layoff situation, it did not have a case of controversy with the immediacy necessary for an informed decision." 801 F.2d at 875.[10]

IV

Applying the law set forth above to the facts of the instant case, the Court concludes that the controversy truly is moot, and the Court must therefore dismiss the case.

[1] With reference to the City of Detroit, plaintiff concedes that all officers ordered to be recalled have been recalled, and have been given their full seniority rights under the contract between the DPOA and the City. The seniority rights of recalled officers are fully protected under the collective bargaining agreement, and there is no showing that the seniority rights of any recalled officer has ever actually been threatened. If such rights were threatened, the recalled officers would have a clear remedy under the contract grievance procedure.

Nonetheless, plaintiffs sought an agreement from defendants with reference to the rights of recalled officers, and the entry of a consent decree. The proposed agreement is as follows:

> As represented to the Court at the May 4, 1988 hearing herein, the parties consider the unchallenged seniority list published by the City of Detroit, on which seniority is based on the date of initial hire as contractually binding as to the status of the recalled officers, notwithstanding any legal rights the parties might otherwise have.

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[10] For other cases discussing mootness, see *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); and *Spear v. City of Oregon*, 847 F.2d 310 (6th Cir.1983).

As shown by the signature of their counsel below, the Court may consider this agreement to be the intent of the parties, and may enter same as a consent decree herein.

The City refused to agree to the entry of any proposed consent decree, but argues that the case should be dismissed as moot.

The Court agrees with the City. Everything the Court sought to accomplish in its original judgment in the within matter has been accomplished. All officers laid off in 1979 and 1980 have been recalled. All of these officers have been given full seniority rights, which are protected under the collective bargaining agreement. Therefore, it appears there is no case or controversy remaining with the City, and the matter is moot as to the City.

[2] With reference to the DPOA, the Court also finds the case to be moot. The Court's principal concern at the time of its original opinions was that black members of the DPOA be given their proper representation in the leadership structure so they can protect their rights. At that time, the black members were a minority, and there was a clear indication that the rights of many of the black officers were not being protected by the white majority.

Since the time of this Court's opinion in 1984, however, the racial composition of the Detroit Police Department has changed. Presently, blacks constitute 51.3 percent of the Department and 70 percent of new hires. In view of the fact that the majority of the membership of the DPOA is now made up of blacks and other minorities, they are able to protect themselves through intra-union political action against actions of white officers that would deprive them of fair representation or rights under 42 U.S.C. § 1981. This being so, there remains no controversy between the NAACP and the DPOA, and the matter is moot.

For the reasons stated, appropriate orders may be entered dismissing the entire action.

Opinion

N.A.A.C.P., DETROIT BRANCH; The Guardians, Inc.; Brady Bruenton; Cynthia Martin; Hilton Napoleon; Sharron Randloph; Betty T. Rolland; Grant Battle; Cynthia Cheatom; Evin Fobbs; John H. Hawkins; Helen Poelnitz, on behalf of themselves and all others similarly situated, Plaintiffs—Appellants,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); David Watroba, President; City of Detroit; Coleman A. Young, Mayor; Detroit Police Dept., Board of Police Commissioners; William Hart, Chief; William Milliken, Governor; The Michigan Employment Relations Commission, Defendants-Appellees

No. 88-1902.

United States Court of Appeals,
Sixth Circuit.

Argued July 31, 1989.

Decided April 9, 1990.

Rehearing and Rehearing En Banc
Denied June 18, 1990.

Employment discrimination action was filed on behalf of black police officers. Following an earlier remand, the United States District Court for the Eastern District of Michigan, 685 F.Supp.1004, Horace W. Gilmore, J., held that the action was rendered moot by events that occurred after the District Court entered an injunction. Appeal was taken. The Court of Appeals, Merritt, Chief Judge, held that: (1) the action was not moot: (2) the last hired, first-fired layoff provision of the collective bargaining agreement was a bona fide seniority system that was exempt from attack under Title VII; and (3) Title VII's provision that protects bona fide seniority systems from attack also extends to attacks under earlier civil rights statutes.

Vacated and remanded.

1. Federal Courts—13.10

Employment discrimination action brought by black police officers was not rendered moot, even after district court's injunction had been invalidated, by events that led to accomplishment of underlying goals of original injunction. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S. C.A. § 2000e-2(h); 42 U.S.C.A. §§ 1981, 1983.

2. Civil Rights—149

Title VII exempts bona fide seniority plans from attack, even if seniority system has disparate impact and even though result may perpetuate prior discrimination. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

3. Civil Rights—149

Last-hired, first-fired seniority system is bona fide and exempt from attack under Title VII unless seniority system was adopted or negotiated with discriminatory motivation or purpose or unless seniority system is administered in irregular or arbitrary way with intend to harm members of protected class. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h).

4. Civil Rights—149

Last-hired, first-fired seniority provision in collective bargaining agreement for city police officers was bona fide and exempt from attack under Title VII, even though seniority system had effect of requiring budgetary layoffs of disproportionate number of black police officers. Civil Rights Act of 1964, § 703(h), as amended 42 U.S.C.A. § 2000e-2(h).

5. Civil Rights—149

Title VII provision that exempts bona fide seniority systems from attack also applies to employment discrimination claims under earlier civil rights statutes. Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e-2(h); 42 U.S.C.A. §§ 1981, 1983; U.S.C.A. Const. Amend. (11), § 5.

Thomas I. Atkins (argued), Brooklyn, N.Y., for plaintiff-appellant.

Jeanne Mirer, Barnhart & Mirer, Detroit, Mich., for plaintiffs.

Frank Jackson, Terri L. Hayles, City of Detroit Law Dept., Detroit, Mich., Daniel B. Edelman (argued), Yablonski, Both & Edelman, Washington, D.C., Allan D. Sobel, Rubenstein, Isaacs, Lax & Bordman, Southfield, Mich., Walter Nussbaum (deceased) (argued), and Michael A. Lockman, Detroit, Mich., for defendants-appellees.

Before MERRITT Chief Judge, and KENNEDY, Circuit Judge, and TODD, District Judge.*

MERRITT, Chief Judge.

In a previous appeal in this action our Court published on June 12, 1987, an opinion, *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, 333 (6th Cir. 1987), holding that a purely *voluntary* affirmative action plan instituted by Mayor Young and the City designed to increase minority representation in the Detroit Police Department could not override the last-hired, first-fired layoff provision of the Union's collective bargaining agreement with the City.[1] We held further that because the Union had

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* The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

[1] This case comes to us with a long procedural history. Plaintiffs initiated this action on September 30, 1980, against Mayor Coleman A. Young, the local police union called the Detroit Police Officers Association, the City of Detroit, and other Detroit municipal officials and agencies. In essence,

not engaged in intentional discrimination, its failure to bargain forcefully against the layoffs made for budgetary reasons did not breach its duty of fair representation. The appeal in the previous case was from a ruling by the District Court that the voluntary plan alone by its own force required a finding of liability against the City and Mayor Young, and an injunctive order disallowing them from laying off 900 black police officers until the plan goals had been met. *See NAACP v. Detroit Police Officers Ass'n*, 591

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plaintiffs made two claims concerning layoffs that the Mayor ordered because of budget constraints:

> 1) that the layoffs ordered by Mayor Young of approximately 900 black police officers pursuant to a layoff provision in the collective bargaining agreement were discriminatory in light of the unmet remedial obligation of the City and the Police Department to undo the effects of past racial discrimination; and
>
> 2) that the Union engaged in racial discrimination and breached it duty of fair representation by failing to actively oppose the layoffs of the black police officers ordered by Mayor Young

Plaintiffs sought declaratory relief, reinstatement, nondiscriminatory assignments, restoration of seniority, back pay, out-of-pocket expenses, and an injunction against future layoffs. After four years of proceedings in the court below, the District Court, applying collateral appeal, held that our decision in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983) (*Bratton I*) (City's voluntary affirmative action plan regarding police department promotions to service upheld, *modified*, 712 F.2d 222 (6th Cir.1983) (*Bratton II*), aff'g *Baker v. City of Detroit*, 504 F.Supp. 841 (E.D.Mich.1980), *modifying Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich.1979), *cert. denied*,, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984), automatically foreclosed further litigation on the issue of prior discrimination in the police department and precluded the City from laying off any police officers under Mayor Young's planned reduction in force. *See NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194 (E.D.Mich.1984). Because it perceived that the layoffs reversed the effects of the voluntary affirmative action plan, the District Court enjoined the City from laying off any police officers in accordance with the seniority provisions of the collective bargaining agreement without prior court approval, and ordered reinstatement of all officers previously laid off. The District Court further found that the DPOA had breached its duty of fair representation by not forcefully fighting the layoffs. *Id.* at 1219.

F. Supp. 1194 (E.D. Mich.1984). We reversed the injunctive orders below and remanded the action for further proceedings.

I

On remand, after conducting proceedings on the motions of the parties for summary judgment, the District Court declared the issues moot and dismissed the case. The court did not reach the defendants' claim that the budgetary layoffs of the black officers were protected under § 703(h) of Title VII because they were made pursuant to a bona fide seniority plan[2] Plaintiffs have now appealed the mootness ruling. We reverse the District Court's decision that the case is moot but conclude that the defendants are protected from liability because the layoffs occurred pursuant to a bona fide seniority plan insulated under § 703(h).

The District Court considered on remand the City's motion for entry of judgment on plaintiffs' § 1983 claim, and the Union's motion for summary judgment on plaintiffs' §§ 1983 and 1981 claims. The court first granted the Union's § 1983 motion and denied the others, reasoning that the trial requested by plaintiffs was not precluded by this Court's determination in *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, that prior discrimination in the police department could not be established solely from our previous approval of a purely voluntary affirmative action plan. Without conducting a trial, the District Judge found that "[e]ven though [the District] Court does not ascribe racial animus to the Mayor and his administration," "race was a motivating factor in the City's action to layoff black officers."

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[2] Title VII, § 703(h), as set forth in 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate . . . .

NAACP v. Detroit Police Officers Ass'n, 676 F.Supp. 790, 795 (E.D.Mich.1988) (citing *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. at 1202). On the plaintiffs' claim against the Union, the District Judge first recognized that we concluded on the first appeal that he had found no intentional discrimination or other improper motivation in the Union's reaction to the threatened layoffs. But again, without conducting a trial, the District Judge, in denying the Union's motion for summary judgment, found that his findings in *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194, "were tantamount to a finding of intentional discrimination . . . ." *NAACP v. Detroit Police Officers Ass'n*, 676 F.Supp. at 797.

After denying defendants' motions for summary judgment, the court ordered briefing on whether plaintiffs' claims had been mooted by events occurring after the injunctive orders had been issued.

[1] Because all the officers laid off had been recalled with retroactive seniority, he concluded that plaintiffs' claims against the City were moot. This conclusion rested on the District Judge's observation that the Union membership had become predominately black, a fact enabling black police officers to protect themselves through their voting power and the opportunity to enter Union leadership. It is this ruling that plaintiffs now appeal.

In dismissing the case, the District Judge said that even though this Court had invalidated his injunctive orders the action was moot because "[e]verything the [District] Court sought to accomplish in it original judgement . . . [by the injunction] has been accomplished." *NAACP v. Detroit Police Officers Ass'n*, 685 F.Supp. 1004, 1007 (E.D.Mich.1988). Specifically, the District Court reasoned that by 1988 all of the officers laid off in 1979 and 1980 had been recalled with full seniority rights thus leaving no case or controversy between plaintiffs and the City. In addition, since completing the recall in 1985, the City had hired 1,290 new officers. The court also held that since the majority of

the membership at the DPOA was not comprised of blacks and other minorities, these minorities had acquired the ability to protect themselves through intra-union political action, thus rendering moot the plaintiffs' claim against the DPOA.

This ruling was erroneous. First the fact that the District Court has accomplished the goals of its own injunctive order, later reversed as having no basis in law, does not render a case moot. Second, assuming for the moment that the plaintiffs had a viable § 1983 claims against the City or the Union for the 1979-80 layoffs, the appropriate remedy would require more than mere recall and retroactive seniority. It would include the determination of other benefits such as backpay and out-of-pocket costs incurred by the laid-off police officers. Such an interest has been recognized as a "concrete interest in the outcome of litigation." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 164 S.Ct. 2576, 2584, 81 L.Ed.2d 483 (198-Q) Third, minority police officers' majority membership in the Union does not "without more" translate into the ability to protect themselves against discriminatory action by the leadership. Rather, their ability to protect themselves depends on factors such as the Union's organizational structure and could not be evaluated in the abstract without further inquiry. In light of these factors, including the Supreme Court's holding in *Stotts*, we conclude that the controversy was not moot.

II

Our inquiry may not end here, however. The defendants moved the District Court for dismissal of the case on alternative grounds. Because, as defendants contended in the court below,[3] the plaintiffs' case is based on a fundamentally erroneous legal theory, we conclude that the case must be dismissed.

In their original complaint, plaintiffs claimed that defendants engaged in discriminatory employment practices that violated the Thirteenth and Fourteenth Amendments to the Constitution, post-Civil War civil rights acts now codified at 42 U.S.C. §§ 1981, 1983 and 1985(3), and Titles VI and VII[4] of the Civil Rights Act of 1964. On this appeal, plaintiffs have preserved only their claims under 42 U.S.C. §§ 1981 and 1983. These claims are barred by § 703(h) of Title VII.

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[3] In their motions and supporting briefs, the Union claimed that § 703(h) of Title VII protected it from liability. *See* DPOA's Brief in Support of Motion for Summary Judgment (Section] 703(h) of Title VII, 42 U.S.C. 2000e-2(h) insulates bona-fide seniority systems from attack through civil rights statutes . . . ."). The City raised the issue as well, relying on the bona fide seniority plan as legal justification for the layoffs. *See* City Defendants' Motion for Entry of Judgment ("[T]he Sixth Circuit determined that the City Defendants acted lawfully and conditionally in making layoffs in 1979 and 1980 pursuant to the *bona fide* seniority provision . . ."); Memorandum of Points and Authorities in Support of City Defendants' Motion for Entry of Judgment ("[T]he Sixth Circuit's opinion . . . upheld the 1979 and 1980 layoffs . . . made pursuant to a *bona fide* seniority provisions, as lawful and constitutional."). This District Judge ignored the defendants § 703(h) defense and his ruling on defendants' motions for judgment failed to discuss the issue.

[4] Although plaintiffs now say they did not assert a Title VII claim in this case, their complaint belies their assertion:

> The violations of law in Counts I, II and III violate the national policy declaration against discrimination in employment articulated by Congress in Title VII of the Civil Rights Act of 1964.

Plaintiffs' Complaint, Count IV.

Title VII is a remedial statute, designed "to assure equality of employment opportunities . . . ." *McDonnell Dougals Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973). The Act was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operations," *Griggs v. Duke Power Co.*, 401 U.S.C.A. 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). "Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *International B'rd of Teamsters v. United States*, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861-62, 52 L.Ed.2d 396 (1977).

The Act's treatment of seniority systems, however, establishes an exception to liability for employment discrimination based on race. From the *Teamsters* case on, the Supreme Court has recognized that were it not for Title VII's § 703(h) exception, last-hired, first-fired seniority plans would be invalid under the *Griggs* rationale. *Id.; see Lorance v. AT & T Technologies, Inc.*—U.S.—, 109 S.Ct.2261, 2265, 104 L.Ed.2d 961 (1989) (quoting *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 81, 97 S.Ct. 2264, 2275, 53 L.Ed.2d 113 (1977)) ("[S]eniority systems . . . are afforded special treatment under Title VII"); *see also Hardison*, 432 U.S. at 79, 97 S.Ct. at 2274 ("Collective bargaining . . . lies at the core of our national labor policy, and seniority provisions are universally included in these contracts"). Special treatment for seniority systems strike a balance between the interests of those protected against discrimination by Title VII and those who work—perhaps for many years—in reliance upon the validity of a facially lawful seniority system. *Lorance*, 109 S.Ct. at 2265.

[2] The provision that exempts seniority plans from attack under Title VII, section 703(h), as set forth in 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . .

Congress included within the sentence quoted above a proviso that limits to some extent the protection extended to, *inter alial*, "bona fide seniority system[s]";[5] provided that such differences are not the result of an intention to discriminate . . . .

Section 703(h) is not an affirmative defense to the conduct described as illegal in Title VII. *See Lorance*, 109 S.Ct. at 2267. Rather, it has been regarded as a definitional provision, *id.*, which " 'delineates which employment practices are illegal and thereby prohibited and which are not.' " *United Air lines, Inc. v. Evans*, 431 U.S. 553, 559, 97 S.Ct. 1885, 1889-90, 52 L.Ed.2d 571 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758, 96 S.Ct. 1251, 1261, 47 L.Ed.2d 444 (1976)). In determining which seniority systems are legal under Title VII,

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[5] Title VII does not define the term "seniority system," and no comprehensive definition of the phrase emerges from the legislative history of § 703(h). *See* 110 Cong.Rec. 1518, 5423, 7207, 7213, 7217, 12,723, 15,893 (1964). The example of a seniority system most frequently cited in the congressional debates was one that provided that the "last hired" employee would be the "first fired." *Id.; see California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605 n. 10, 100 S.Ct. 814, 819 n. 10, 63 L.Ed.2d 55 (1980) (requirement under collective bargaining agreement that temporary employee must work at least 45 weeks in a year before claiming benefits attending permanent-employee status is a "seniority system" within § 703(h)). In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that allots to employees *ever* improving employment rights and benefits as their relative lengths of permanent employment increase. *Id.* The principal feature of any and every seniority system is that preferential treatment is dispensed on the basis of some measure of time served in employment. *Id.* Given the lengthy legislative history and comprehensive discussions found in Supreme Court opinions on the topic, it is clear that the last-hired, first-fired provision before us is a "seniority system" within the meaning of subsection(h).

that is, which are "bona fide" and thus not precluded by the proviso, the Supreme Court has consistently held that under subsection (h), a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre- or post-Act[6] discrimination. In the Court's review, "the unmistakable purpose of § 703(h)," *Teamsters*, 431 U.S. at 352, 97 S.Ct. at 1863, was to allow employers and unions routinely to apply bona fide seniority systems even though the employer's discriminatory hiring practices may have resulted in whites having greater seniority than blacks. *See, e.g., Stotts*, 467 U.S. at 587, 104 S.Ct. at 2592 (O'Connor, J., concurring) ("Title VII affirmatively protects bona fide seniority systems, including those with discriminatory effects on minorities."); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 102 S.Ct. 1534, 1535-36, 71 L.Ed.2d 748 (1982) (under § 703(h), discriminatory impact alone will not invalidate otherwise rigid system); *Hardison*, 432 U.S. at 82, 96 S.Ct. at 2276 ("[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."); *Teamsters* 431 U.S. at 350, 97 S.Ct. at 1862 (although Title VII violation may be established by facially neutral practices that freeze prior discrimination, "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."); *White v. Colgan Elec. Co.*, 781 F.2d 1214 (6th Cir. 1986) (inverse layoff procedure controls even when it retards goals of consent decree); *see also* 110 Cong. Rec. 7207, 7213, 7217 (1964) (Title VII has no effect on established seniority rights).

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[6] Any doubt over whether § 703(h) protects discriminatory systems applied or adopted after the enactment of Title VII was settled in *American Tobacco Co. v. Patterson* 456 U.S. 63, 75-76, 102 S.Ct. 1534, 1540-41, 71 L.Ed.2d 748 (1982) which held that it does. The majority's position in *American Tobacco* was anticipated by the Court in *Teamsters*, 431 U.S. at 348 n. 30, 352, 97 S.Ct. at 1861 n. 30, 1863, and *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889.

In order to avoid dismissal, therefore the plaintiffs' challenge to a seniority system under Title VII must allege facts which if true, would make out a case of discriminatory intent. *See Lorance,* 109 S.Ct. at 2368 (successful claim depends on proof of intentionally discriminatory adoption of facially lawful system); *Pullman-Standard v. Swint*, 456 U.S. 273, 289, 102 S.Ct. 1781, 1790, 72 L.Ed.2d 66 (1982) ("Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate."); *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 610-11, 100 S.Ct. 814, 821-22, 63 L.Ed.2d (1980) (remanding to district court to test whether system was bona fide or whether differences in employment conditions it produced resulted from purposeful racial discrimination); *Evans*, 431 U.S. at 560, 97 S.Ct. at 1890 ("Since respondent does not attack the bona fides of [the employer's] seniority system, and since she makes no charge that the system is intentionally designed to discriminate because of race . . . [or] sex, . . . § 703(h) [defeats her claim].").

III

[3] Neither Mayor Young, the City, nor the Union expected the layoffs to affect white and black officers equally. The defendants knew that enforcement of the seniority plan would have a discriminatory impact on newly hired black officers. This type of discrimination, however, is congressionally immunized by § 703(h) and by the decisions of the Supreme Court:

> Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements. Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance.

American Tobacco, 456 U.S. at 76-77, 102 S.Ct. at 1541-42 (citation and footnote omitted).

Of course, § 703(h) and its proviso does not immunize *all* seniority systems from attack under the civil rights statutes. It refers only to "bona fide" systems. As the Supreme Court has stated:

> Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703(h).

California Brewers Ass'n, 444 U.S. at 608-09, 100 S.Ct. at 821.

Whether last-hired, first-fired seniority provisions are bona fide was answered at the legislative hearings on Title VII. *See* 110 Cong.Rec. 1518, 5423, 7202, 7213, 7217, 12,723, 15,893 (1964). During the congressional debate on § 703(h), Senator Clark placed in the Congressional Record a Justice Department statement, later endorsed by the Supreme Court, which stated:

> It is perfectly clear that when a worker is laid off . . . because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. . . . But, in the ordinary case, assuming that seniority rights were built up

> over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race.

Franks, 424 U.S. at 760 n. 16, 96 S.Ct. at 1262 n. 16 (quoting 110 Cong.Rec. 7207 (1964)).

Therefore, in analyzing the scope of subsection (h) and its proviso in light of the pertinent Supreme Court cases and the legislative history of § 703(h), we conclude that in order to prevail, a plaintiff must show either that the employer's practice is not a seniority system or part of a seniority system, or that the seniority system is not bona fide. A seniority system is not bona fide if one of the following criteria is met: 1) that the seniority system was adopted or negotiated with a discriminatory motivation or purpose; or 2) that the seniority system was administered in an irregular or arbitrary way with intent to harm members of a protected class.

IV

[4] In the instant case, plaintiffs do not claim that the last-hired, first-fired provision to which the Union and the City agreed in 1967 as part of their first collective bargaining agreement, was not a seniority plan or part of a seniority plan. Nor have they at any stage of this litigation challenged the bona fides of the plan, Supplemental Brief for Plaintiffs-Appellants at 14 ("Plaintiffs throughout have not questioned whether the seniority system was bona fide. . . ."), or that the plan met any of the criteria listed above as evidence that a plan is not bona fide. Nor do plaintiffs contend that the same plan was re-adopted subsequently by Mayor Young, the City, or the Union for the purpose of discriminating against blacks, *see NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. at 1219, or that its layoff provisions were administered in an irregular or arbitrary way in order to harm black officers. *See id.* at 1202; Plaintiffs' Complaint ¶ 6, at

22 (failure to modify seniority plan is facially neutral but discriminatory in *effect*).

Instead, plaintiffs argue only that Mayor Young and the City "strictly followed" the provision, and that the Union refused to *modify* the provision in the collective bargaining agreement when warned that the clause would require the layoff of minorities recently hired under the City's affirmative action plan. Plaintiffs' Complaint ¶¶ 36-37, at 14-15; *id.* ¶ 1(c), at 27. Their claim that the seniority plan, by "requir[ing] officers with the least seniority to be laid off first," "perpetuat[ed] the racially discriminatory impact of the previous illegal exclusion of minorities from the police force," *id.* ¶ 61, at 18; *see also id.* ¶ 4, at 22, describes the type of Title VII discrimination generally prohibited by *Griggs* specifically immunized according to Supreme Court interpretations of § 703(h) discussed above.

Little would be left of *Teamsters* if the results of the normal operation of a concededly bona fide seniority system could establish racial discrimination. *See Teamsters* 431 U.S. at 352, 97 S.Ct. at 1863; *are also California Brewers Ass'n*, 444 U.S. at 600, 100 S.Ct. at 816. In such a case the employer would be found liable not for present racial discrimination but for complying with a seniority system. Such a ruling would be plainly inconsistent with the dictates of § 703(h), both on its face and as interpreted in the decisions of the Supreme Court.

V

On facts similar to those before us, the Supreme Court's decision in *Stotts* makes the same essential point as the cases described above: Section 703(h) will have the effect of preserving some prior discrimination—an effect that contracting parties are aware of and intend when they enter into such agreements. But the congressional purpose in adopting § 703(h) was to give such contracts priority over plans which alter seniority through racially based layoffs. In *Stotts*, the City of Memphis had adopted an affirmative action plan by consent decree requiring an

increase in the proportion of minority employees in its fire department. As in Detroit, budgetary cuts led to layoffs, under which many of the black employees who had been hired pursuant to the consent decree would have been laid off first. The Court held that the District Court lacked the power to enforce a consent decree requiring layoffs in conflict with the bona fide seniority provision of the collective bargaining agreement. In so doing, the Court rejected the argument that

> because the City was under a general obligation to use its best efforts to increase the proportion of blacks on the force, it breached the decree by attempting to effectuate a layoff policy reducing the percentage of black employees in the Department even though such a policy was mandated by the seniority system adopted by the City and the Union.

Stotts, 467 U.S. at 573-74, 104 S.Ct. at 2585. The Court concluded that neither the decree nor the parties contemplated that the City would "simply disregard its arrangements with the Union." *Id.* at 574, 104 S.Ct. at 2585. Because the District Court's order enjoining the City from layoffs that would decrease black membership in the department conflicted with § 703(h), and because the District Court had found that the layoff proposal was not adopted with the purpose or intent to discriminate on the basis of race, the action of the District Court enjoining the City from applying its seniority system in making the layoffs was reversible error. *Id.* at 579-83, 104 S.Ct. at 2588-90.

The seniority provision in this case, which plaintiffs challenge on the same grounds, must be upheld for the same reasons. Neither case involved a claim or finding that the seniority plan was adopted or imposed with a discriminatory purpose. Likewise, neither the consent decree in *Stotts* nor the voluntary affirmative action plan here provided for or suggested any departure or intent to depart from the City's collective bargaining agreement with the Union. *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d at 332-33.

It should be noted that the Supreme Court declined to enforce a judicially approved consent decree so as to reverse the effects of layoffs under a bona fide seniority plan. Likewise, we may not enforce the purely *voluntary* plan in order to reverse the effects of the bona fide seniority plan here. We thus are barred by *Stotts* from interpreting the voluntary affirmative action plan before us to require the City to disregard the seniority provisions of the collective bargaining agreement, and hold that plaintiffs' claims should have been dismissed below as a matter of law.[*]

Absent a finding of intentional discrimination under the proviso to § 703(h), we may not reverse or enjoin the operation of a bona fide seniority plan that Congress intended to validate and

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[*] Plaintiffs rely on *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion), in which the Court held that a one-for-one promotion requirement to redress past and present discrimination against black state troopers in Alabama withstood strict scrutiny analysis under the Fourteenth Amendment. *Paradise* did not involve layoffs under a bona fide seniority plan protected by § 703(h). It thus is inapposite in that it fails to test the validity of an inverse seniority layoff plan like the one at issue here.

In his plurality opinion in *Paradise*, Justice Brennan emphasized another aspect of the distinction between hiring and promotions and layoffs. He reasoned that the one-for-one requirement in *Paradise* was less burdensome than the layoff provision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), which was invalid because it required the discharge of more senior white employees in favor of less senior blacks. *See Paradise*, 480 U.S. at 182-83, 107 S.Ct. at 1073 (Brennan, J.); *id.* at 188-89, 107 S.Ct. at 1076 (Powell, J., concurring).

protect when it passed § 703(h). Congress in so doing acted pursuant to its enforcement powers under section 5 of the Fourteenth Amendment.[8] *See Fullilove v. Klutznick* 448 U.S. 448, 472-73, 100 S.Ct. 2758, 2771-72, 65 L.Ed.2d 902 (1980) (plurality opinion) ("[W]e are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.") (citations omitted); *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-24, 16 L.Ed.2d 828 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."). No court has held, and plaintiffs do not contend, that § 703(h) is unconstitutional. Thus, it must be applied to validate and protect the bona fide seniority plan at issue in this case and the layoffs and recalls that occurred under it.

VI

[5] Although plaintiffs content that the protections granted to bona fide seniority systems under § 703(h) apply only to claims brought under Title VII, we decline to read Congress's earlier, more general pronouncements in §§ 1981 and 1983 from the Civil Rights Act of 1870 to undermine the force of its later specific declarations of civil rights policy regarding bona fide seniority plans in § 703(h) of the Civil Rights Act of 1964. Basic principles of statutory construction dictate this result:

> General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict,

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[8] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

> the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.... Where the special statute is later it will be regarded as an exception to or qualification of the prior general one....

Sutherland Statutory Construction § 51.05, at 499-500 (N. Singer ed. 1984) (footnotes omitted). The Supreme Court has consistently endorsed this canon of construction. *See, e.g., Brown v. General Servs. Admin.*, 425 U.S. 820, 834, 96 S.Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976) ("In a variety of contexts the Court has held that a precisely drawn, detailed statute preempts more general remedies,"); *Preiser v. Rodriquez*, 411 U.S. 475, 489-90, 93 S.Ct. 1827, 1836-37, 36 L.Ed.2d 439 (1973) (although § 1983 by its terms was literally applicable to prisoners' actions, challenges to fact or duration of imprisonment appropriately lie only under habeas corpus, the "more specific act").[9] Inherent in the Court's admonition that statutes such as those before us be read *in pari materia* is its recognition that Congress passed all three Acts pursuant to its enforcement powers under § 5 of the Fourteenth Amendment. Title VII, in addition to being enacted nearly a century later, devotes 27 pages of the United States Code to a detailed treatment of employment discrimination. In drafting §§ 1981 and 1983, on the other hand, Congress conferred on all citizens, in two paragraphs drafted in general terms, equal rights "to make and enforce contracts," (§ 1981) and a private right of action to redress state-sponsored deprivations of civil rights (§ 1983).

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[9] The Court frequently has held that a narrowly tailored employee compensation scheme preempts the more general tort recovery statutes. *E.g., United States v. Demko*, 385 U.S. 149, 87 S.Ct 382, 17 L.Ed.2d 258 (1966) (18 U.S.C. § 4126; Federal Tort Claims Act); *Patterson v. United States*, 359 U.S. 495, 79 S.Ct. 936, 3 L.Ed.2d 971 (1959) (Federal Employees' Compensation Act; Suits in Admiralty Act); *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849, 96 L.Ed. 1051 (1952) (Federal Employees' Compensation Act; Public Vessels Act).

Opinion

Assuming without deciding that plaintiffs set forth colorable claims against the Union under § 1981[10] and against the City and city officials under § 1983,[11] we decline to endorse plaintiffs' claim that Title VII's legislative protection of bona fide seniority plans can be evaded simply by characterizing an action otherwise falling within the parameters of Title VII as a § 1981 or § 1983 suit. Congress did not intend that its detailed remedial scheme

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[10] Plaintiffs contention that the Union's failure to protect black officers from layoffs may not state a claim according to the Supreme Court's most recent interpretation of § 1981, which narrowed the statutory breadth of the phrase "to make and enforce contracts." *See Patterson v. McLean Credit Union*,—U.S.—, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). There, the Court held that "post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII." *Id.* 109 S.Ct. at 2373. Further, the Court limited the right to enforce contracts to "conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.*

Because plaintiffs in our case seek relief under § 1981 for post-formation conduct by the Union, and do not claim that their right to invoke the legal process has been hindered, *Patterson* may preclude their § 1981 action altogether. In light of our understanding of the impact of § 703(h) on § 1981, however, we need not reach the question of how *Patterson* might affect plaintiffs' § 1981 claim.

[11] Likewise, plaintiffs, § 1983 claim, grounded in the notion that the inverse layoff plan and procedure deprived the laid-off black police officers of equal protection of the laws under the Fourteenth Amendment, also may be without merit by virtue of previous decisions rendered in this litigation. We already have held that the City 's institution of a voluntary affirmative action plan, based on the City's own determination that it had discriminated in the past, was constitutionally permissible but did not mandate a court-ordered remedy tantamount to a permanent contract of employment. *See NAACP v. Detroit Police Officers Ass'n*, 821 F.2d at 331; *Bratton II*, 712 F.2d at 223; *see also Bratton I*, 704 F.2d at 902 (Merritt, J., dissenting). Accordingly, plaintiffs' § 1983 claim could well be precluded by the "law of the case." Again, however, as with plaintiffs' § 1981 claim against the Union, we believe that § 703(h) insulates the City and its officials from liability under § 1983, and therefore need not decide whether plaintiffs state a valid claim under the latter.

constructed in Title VII be circumvented through pleadings that allege other causes of action under general statutes.

Although the Supreme Court has recognized that Congress did not, with the passage of the Civil Rights Act of 1964 and its 1972 amendments, intend to repeal existing statutes in the civil rights field, or make Title VII the exclusive remedy in all employment discrimination contexts,[12] *see Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (timely filing of Title VII action does not toll statute of limitations period applicable to § 1981 action brought on same facts) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S.Ct. 1011, 1020, 39 L.Ed.2d 147 (1974) (Title VII action not forfeited when plaintiff first pursues arbitration of grievance under collective bargaining agreement), it also has declined to permit artful pleading to avoid both the requirements and consequences of a Title VII action by any other name. *See Patterson v. McLean Credit Union*,—U.S.—, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (post-formation conduct more naturally governed by state contract law and Title VII than by § 1981); *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-76, 99 S.Ct. 2345, 2350-51, 60 L.Ed.2d 957 (1979) (section 1985(3), which creates no substantive rights, cannot be used to bypass administrative process of Title VII); *Brown*, 425 U.S. at 828-29, 96 S.Ct. at 1965-66 (congressional intent in 1972 amendments was *inter alia*, to create exclusive judicial scheme for redress of federal public employment discrimination, thus distinguishing *Johnson*, which applies only to private employment discrimination).

Although the Supreme Court has yet to address directly the relationship between § 703(h) and the earlier civil rights statutes, our decision to read these overlapping provisions in *pari materia* is reinforced by the decisions of other courts of appeals, *See, e.g.*,

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[12] In drafting the Equal Employment Opportunity Act of 1972, which extended the protections of Title VII to public employment contexts, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. *See* 118 Cong.Rec. 3371-73 (1972).

Chance v. Board of Examiners & Bd. of Educ., 534 F.2d 993, 998 (2d Cir. 1976) ("Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000e-2"; "[t]hat plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack."), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977); *Watkins v. United Steel Workers of America*, 516 F.2d 41, 49-50 (5th Cir.1975) (although § 1981 prohibits some employment practices not unlawful under Title VII, provisions of collective bargaining agreement are valid under § 703(h) and do not violate § 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92 n. 37 (5th Cir.1978) ("[T]he protection[s] accorded bona fide seniority systems by section 703(h) apply whether suit is brought under Title VII or section 1981."), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n. 3 (5th Cir.1980) ("No chameleon-like change in the nature of the relief is experienced simply because it is sought under sister provisions in the federal statutes."); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1320 n. 4(7th Cir.1974) ("Having passed scrutiny under . . . Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981."), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1348-49 (11th Cir.1983) (close relationship between Title VII and § 1981 leads to conclusion that § 703(h) applies to § 1981 claims); *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1575 n. 41 (11th Cir.1988) (immunity created by § 703(h) extends to § 1981 claims).

No case in our Court has previously examined the § 703(h) issue presented here. We have, however, interpreted other specific provisions of Title VII as limitations upon a § 1983 cause of action. *See Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir.1984). It would be anomalous, we said, to permit plaintiffs to bypass the administrative procedures of Title VII simply by proceeding under § 1983. *Id.* at 1204. We reserved

ruling on the relationship between § 1981 and Title VII, however. Although *Day* suggests that Title VII and § 1981 are not mutually exclusive remedies in general, it does not discuss whether § 703(h) may protect bona fide seniority plans attacked under other civil rights statutes that pre-date Title VII.

VII

The plaintiffs neither state nor offer any facts or claim in their pleadings or in evidentiary material offered on summary judgment on the basis of which, if true, a federal court could hold that the seniority system at issue is barred by § 703(h) of Title VII. Plaintiffs' theory of liability is without merit. Section § 703(h) governs and protects the seniority-based layoffs by Mayor Young, the City, and the Union under the bona fide seniority plan negotiated as part of the collective bargaining agreement between the City and the Union.

The District Court's erroneous judgment that the cause is moot is vacated and set aside.

The case is remanded to the District Court with instructions to dismiss the complaint, as supplemented by additional factual allegations and evidentiary material in motions and other documents in the record, for failure to state a claim under Rules 12(b) and 56 of the Federal Rules of Civil Procedure.[13]

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[13] Rule 12(b) states in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .
>
> Fed.R.Civ.P. 12(b).

Rule 56 states in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> Fed.R.Civ.P. 56(c)

No. 90-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P. DETROIT BRANCH, *et al.*,
Petitioners,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA), *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS CITY OF DETROIT, MAYOR COLEMAN A. YOUNG, THE DETROIT POLICE DEPARTMENT, CHIEF OF POLICE WILLIAM L. HART, AND THE DETROIT BOARD OF POLICE COMMISSIONERS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that operation of a *bona fide* seniority rule in connection with layoffs of public employees does not violate the Equal Protection Clause of the United States Constitution.

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PRELIMINARY STATEMENT

Respondents City of Detroit, Mayor Coleman A. Young, the Detroit Police Department, Chief of Police William L. Hart, and the Detroit Board of Police Commissioners (referred to herein as the "City Defendants") submit this brief in opposition to the petition for a writ of certiorari.[1]

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[1] Respondents Detroit Police Officers Association ("DPOA") and David Watroba are separately represented.

COUNTERSTATEMENT OF THE CASE

Plaintiffs, a class of black police officers, maintain this employment discrimination suit under 42 U.S.C. § 1983, claiming that their layoffs by the Detroit Police Department in 1979 and 1980 were unconstitutional. The layoffs were made pursuant to a collectively-bargained rule of inverse seniority under which officers most recently hired were first laid off.

The District Court, in an opinion dated July 25, 1984, held the layoffs unconstitutional in that they reduced the level of black representation among police officers and thereby violated what the District Court found to be Detroit's "affirmative duty" to eliminate the effects of past discrimination. *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194 (E.D. Mich. 1984) (A. 1, 14-15).[2] The District Court held the layoffs unconstitutional notwithstanding findings (1) that the layoffs were made in response to a budgetary crisis (A. 8); (2) that the inverse seniority provision pursuant to which the

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[2] Shortly after taking office, Detroit Mayor Coleman A. Young, in 1974, initiated affirmative action measures, including minority recruiting and race-conscious promotions, to increase black representation at all levels of the police department (A. 8).

In a separate suit, maintained by a group of white officers challenging Detroit's affirmative action promotions to the rank of police lieutenant, the District Court credited evidence—offered by Detroit in defense of its use of race-conscious measures—that the Department had intentionally discriminated against blacks in police hiring up to the years 1967-68. *Baker v. City of Detroit*, 483 F. Supp. 930, 992 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The Court held that Detroit had a compelling interest in eliminating remaining effects of its pre-1968 past discrimination which warranted its use of race-conscious promotion measures.

The class of black officers affected by Detroit's 1979 and 1980 layoffs were hired between 1975 and 1978 (A. 8); no evidence was presented that any of them had been a victim of the past discrimination established in the *Baker/Bratton* litigation (A. 32).

layoffs were made was *bona fide* (A. 39, 52); and (3) that the layoffs occurred without "racial animus" on the part of the City Defendants (A. 17).

The Court of Appeals, in a decision dated April 9, 1990, *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990) (A. 94), rejected the Plaintiffs' constitutional claim.[3] It held that § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), immunizes the operation of Detroit's *bona fide* seniority rule from constitutional, as well as statutory, attack (A. 108, *et seq.*)

REASONS FOR DENYING THE WRIT

I. THE ASSERTED CONFLICT AMONG THE COURTS OF APPEALS IS NON-EXISTENT

The Courts of Appeals have for years consistently upheld the operation of "last hired-first fired" seniority rules which typically govern employee layoffs, in both public and private employment, against challenges asserted not only under Title VII but also under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 that such rules perpetuate the effects of past hiring discrimination. *See Watkins v. United Steelworkers Local 2369*, 516 F.2d 41, 43-52 (5th Cir. 1975 (§ 1981 and Title VII); *Jersey Central Power & Light Co. v. Electrical Workers, IBEW*, 508 F.2d 687, 705-06 (3rd Cir. 1975) (Title VII); *Waters v. Wisconsin Steel Works of Int'l Harvester*, 502 F.2d 1309, 1318-20 & n.4 (7th Cir. 1974) (§ 1981 and Title VII); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (§§ 1981 and 1983 and Title VII).

In *Chance*, which challenged layoffs of minority public employees on *constitutional* as well as statutory grounds, the Second Circuit stated: "That plaintiffs . . . are pro-

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[3] The intervening procedural history between the 1984 and 1990 decisions—including a 1987 remand decision by the Court of Appeals (A. 57) and ensuing decisions of the District Court in 1988 (A. 67, 87)—is described by the Court of Appeals at A. 96-100.

ceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack." 534 F.2d at 998.[4] *See Firefighters, Inc. for Racial Equality v. Bach*, 731 F.2d 664, 666 n.2 (10th Cir. 1984) ("None of the other statutes cited by Plaintiffs [42 U.S.C. §§ 1981, 1983, 2000d] authorize any remedies in excess of those available under Title VII"); *Whiting v. Jackson State University*, 616 F.2d 116, 122 n.3 (5th Cir. 1980) ("No chameleon-like change in the nature of the relief is experienced simply because it is sought under sister provisions in the federal statutes.") *See also Fiesel v. Bd. of Educ. of New York*, 524 F. Supp. 48, 50 (E.D.N.Y. 1981), *aff'd*, 675 F.2d 522 (2d Cir. 1982); *Stokes v. New York Department of Correctional Services*, 569 F. Supp. 918, 922-25 (S.D.N.Y. 1982).

The Petition incorrectly asserts conflict between the Court of Appeals' decision and *Morgan v. O'Bryant*, 671 F.2d 23, 28 (1st Cir. 1982), and *Arthur v. Nyquist*, 712 F.2d 816, 822 (2d Cir. 1983), two suits by school children and their parents complaining of racially-segregated, public schools. Neither case remotely suggests that the operation of a *bona fide* seniority provision would be susceptible to constitutional challenge in the context of an employment discrimination suit; as explained below, *Arthur* clearly disclaims such a suggestion. Both cases upheld district court orders requiring that layoffs be made—notwithstanding collectively-bargained, inverse seniority rules—on a racially-proportionate basis in aid of school desegregation decrees. Both decisions made plain that curtailment of the non-minority teachers' seniority rights was warranted only by the need to vindicate the rights of the

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[4] Petitioners' own parenthetical description of *Chance*—as a case where there was no claim that the employer's layoff plan was itself discriminatory—reflects the *lack* of distinction between *Chance* and this case. *See* Petition at 9, n.19, *quoting, Chance, supra*, 534 F.2d at 999. Here also, as the Court of Appeals observed (A. 107), Petitioners have not contested the *bona fides* of Detroit's layoff provision at any stage of the litigation.

minority children and parents to a fully-desegregated education.[5]

The Second Circuit in *Arthur* made plain that a layoff remedy curtailing seniority rights of non-minority employees could not be sustained in the context of an employment discrimination suit consistent with *Chance*. It stressed that the layoff question in *Chance*, where it reversed such a remedy, arose "solely in the context of employment discrimination", *Arthur, supra*, 712 F.2d at 822 n.5, and that *Chance*, albeit maintained under §§ 1981 and 1983 was "therefore *analogous to a Title VII suit and not a school desegregation case.*" (Emphasis added).

There is no conflict with *Morgan* and *O'Bryant*. Petitioners' § 1983 claim is obviously controlled by *Chance* and the host of other decisions in employment discrimination cases which uphold the operation of *bona fide* seniority rules governing employee layoffs in public and private employment alike.

II. THE COURT OF APPEALS' DECISION IS WHOLLY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The Court of Appeals' decision in this case accords with prior decisions of this Court.

This Court since 1977 has held repeatedly that § 703 (h) of Title VII affirmatively protects the application of *bona fide* seniority provisions. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *Trans World Airlines,*

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[5] The First Circuit emphasized that "the victims here are the black school children, not the possible hiring discriminatees" and that the court orders were designed "to make the school children whole." *Morgan, supra*, 671 F.2d at 27. Likewise, the Second Circuit stated that the district court had authority to curtail seniority rights of the non-minority teachers "in order to vindicate the constitutional rights of the minority children . . . ." *Arthur, supra*, 712 F.2d at 822, n.5.

Inc. v. Hardison, 432 U.S. 63, 79 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75-76 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 277 (1982). As the Court of Appeals observed, "[l]ittle would be left of *Teamsters* if the results of the normal operation of a concededly bona fide seniority system could establish racial discrimination" in violation of the Constitution (A. 108).

The Court of Appeals' decision that operation of a *bona fide* seniority provision does not violate § 1983 also follows necessarily from this Court's holdings that discriminatory intent is an essential element of any claimed violation of the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metro. Hsg. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). The District Court's finding that the layoffs challenged here occurred pursuant to the application of *bona fide* seniority, and its refusal to ascribe racially-discriminatory animus to Detroit and its officials, necessarily preclude a determination that the layoffs violated the Constitution.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), this Court held:

> Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination . . . .

Id. at 576, n.9. The Court declared that "the City [of Memphis] *could not be faulted* for following the seniority plans expressed in its agreement with the Union." *Id.* at 577 (emphasis added). The Court of Appeals in this case correctly determined that the operation of the "seniority provision [here] . . . must be upheld for the same reasons." (A. 110).[6]

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[6] This understanding of *Stotts* was reenforced by opinions in *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986). In Section

The Court of Appeals' decision also accords with this Court's decision in *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053 (1987), on which Petitioners mistakenly rely (*see* Petition at 9, n.19). This Court in *Paradise* held that a one-for-one promotion requirement to redress past and present discrimination against black state troopers in Alabama withstood strict scrutiny under the Fourteenth Amendment. As observed by the Court of Appeals, the racial preference in *Paradise* in no way implicated the operation of any *bona fide* seniority rule and moreover operated in *promotions* not *layoffs* (A. 110, n.7). Justice Brennan's plurality opinion specifically stated that the "one-for-one requirement does not *require the layoff* and discharge of white employees and therefore *does not impose burdens of the sort that concerned the plurality in Wygant* . . . ." *Id.* at 1073 (emphasis added). Similarly Justice Powell's concurrence distinguished the impact of a racial preference in promotions from that in connection with layoffs. 107 S.Ct. at 1076.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court overturned as unconstitutional a provision preserving minority representation incident to layoffs which had been mutually agreed upon in collective bargaining.[7] *Wygant*—which Petitioners fail to mention

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IV-D of his opinion for a plurality of the Court, Justice Brennan recalled the holding in *Stotts* that modification of the consent decree to preclude the operation of *bona fide* seniority violated § 703(h) of Title VII which " 'permits the routine application of a seniority system absent proof of an intention to discriminate.' " *Sheet Metal Workers, supra*, 478 U.S. at 472, quoting *Stotts, supra*, 467 U.S. at 577. Justice Brennan explained: "Since the District Court had found that the proposed layoffs were not motivated by a discriminatory purpose, we held that the court erred in enjoining the city from applying its seniority system in making the layoffs." 478 U.S. at 472. *See also* 478 U.S. at 499 (White, J., concurring generally in Section IV-D of Justice Brennan's plurality opinion).

[7] The District Court's 1984 decision was grounded in part on its pre-*Wygant* view that a minority retention rule, if agreed upon through collective bargaining, would be lawful and constitutional (A. 53).

—casts doubt on whether any preferential layoff provision could be sustained.[8] Petitioners' claim—that the City Defendants violated the Constitution by failing to abrogate the *bona fide* seniority rule provided in their collective bargaining agreement—is squarely contrary to the views stated by Justice Powell for the *Wygant* plurality and is also plainly contrary to the rationale of the *Wyant* dissenters.

The fact that Detroit's basis for making race-conscious promotions had been sustained in the *Baker/Bratton* litigation neither required nor permitted Detroit to abrogate its *bona-fide* seniority rule governing layoffs. In its 1987 remand decision, the Court of Appeals stated:

> The Court in *Bratton* did not impose a legal duty on the City to hire or retain the particular employees being laid off here. Judicial approval of a voluntary affirmative action plan does not create a contract of permanent employment or invalidate or modify a collective bargaining agreement providing for layoffs on the basis of seniority.

NAACP v. DPOA, 821 F.2d 328, 331 (6th Cir. 1987) (A. 62).

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[8] Justice Powell's plurality opinion concluded that minority retention provisions are not sufficiently narrowly-tailored to pass constitutional muster. 476 U.S. at 269, 282-83. *See* 476 U.S. at 295 (White, J., concurring in the judgment). Justice O'Connor's concurring opinion left open the "troubling question" whether any minority retention provision could be sustained. 476 U.S. at 284, 293-94.

The dissenting opinions emphasize the minority-retention provision's adoption in collective bargaining. *See* 476 U.S. at 295, 311 (Marshall, J., dissenting); 476 U.S. at 313, 317-18 (Stevens, J., dissenting). Justice Marshall emphasized that *Wygant* was "not a case in which a party to a collective-bargaining agreement *has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision.*" 476 U.S. at 300 (emphasis added). Nothing in the *Wygant* dissents suggests receptivity to the entirely-novel contention of Petitioners here that Detroit violated the Constitution by *refraining* from just such a unilateral abrogation of its contractual seniority provision.

The Court of Appeals' decision that the City Defendants did not violate the Constitution by making layoffs pursuant to a *bona fide* seniority rule is consistent with the decisions of this Court and other Courts of Appeals and in no way warrants this Court's review.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1990

No. 90-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS DPOA AND DAVID WATROBA

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October 31, 1990

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that bona fide seniority plans relating to layoffs of public employees are exempt from attack under the constitution, the Civil Rights Act of 1964 and earlier civil right statutes.

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PRELIMINARY STATEMENT

Respondent DPOA and David Watroba, President (hereinafter collectively referred to as "Respondent DPOA"), submit this brief in opposition to the petition for writ of certiorari. Respondents City of Detroit, Coleman A. Young, Detroit Police Dept., Board of Police Commissioners, and William Hart (collectively referred to as "the City") are separately represented, and Respondent DPOA incorporates by reference the arguments of the City in opposition to the petition for writ of certiorari.

No. 90-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS DPOA AND DAVID WATROBA

COUNTER-STATEMENT OF CASE

The individual Petitioners are a class of black police officers employed by the City of Detroit. This suit was filed against the City and Respondent DPOA alleging that certain layoffs of police officers in 1979 and 1980 violated Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1981, 42 U.S.C. §1983, and 42 U.S.C. §1985(3). The layoffs were made pursuant to a bona fide seniority plan collectively

bargained for by Respondent DPOA and the City. This plan called for layoffs to be made on a "last-hired, first-fired" basis.

Petitioners based their action on *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), which held that the City had engaged in intentional racial discrimination violative of the Equal Protection Clause. Petitioners alleged the layoffs reduced the percentage of black officers on the uniformed force, while the City had not remedied the effects of past discrimination found in *Baker* by increasing the number of black officers on the force. The specific allegations against Respondent DPOA were that by allowing the layoffs to occur and not bargaining to stop the layoffs and to protect the jobs of Petitioners, it had violated 42 U.S.C. §§1981, 1983, and 1985(3), the Thirteenth Amendment of the United States Constitution, and had breached its duty of fair representation under Michigan law.

Each claim of Petitioners against Respondent DPOA has been dismissed. The District Court, in an opinion dated July 25, 1984, held that Respondent DPOA was not liable under the Thirteenth Amendment, and that the DPOA had not violated 42 U.S.C. §1985(3) as there was no conspiracy between the City and the DPOA. *N.A.A.C.P. v. D.P.O.A.*, 591 F.Supp. 1194 (E.D. Mich. 1984), P. A-1, 53[1]. However, that court did not hold that the DPOA breached the duty of fair representation owed its minority members.

The Sixth Circuit Court of Appeals, in a decision dated June 12, 1987, reversed the District Court's holding as to Respondent DPOA's duty of fair representation. *N.A.A.C.P. v. D.P.O.A.*, 821 F.2d 328 (6th Cir. 1987), P. A-57, 65-66. The Court of Appeals held that under Michigan law, a public employer's decision to lay off employees is a permissive bargaining subject and therefore the union had no mandatory duty to act on behalf of those threatened with a layoff.

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[1] Page references are to the Appendix contained in the Petition for Writ of Certiorari.

The matter was remanded to the District Court for consideration of Petitioners' claims against the DPOA that had not been reached by the District Court. On remand the District Court dismissed the Petitioners' §1983 claim against the DPOA, as the actions of the DPOA did not involve "state action." *N.A.A.C.P. v. D.P.O.A.*, 676 F.Supp. 790 (E.D. Mich., 1988), P. A-67, 70. The District Court later held, in a separate opinion, that any action against the union was moot, as everything which the court had desired to accomplish in its original judgment had been accomplished at that time. The District Court noted that a majority of the members of the DPOA were black, and therefore they were able to protect themselves through intra-union political action. *N.A.A.C.P. v. D.P.O.A.*, 685 F.Supp. 1004 (E.D. Mich. 1988), P. A-87, 90-93.

The Court of Appeals, in a decision dated April 9, 1990, affirmed the District Court's decision on other grounds. Although it found that the matter was *not* moot, it held that §703(h) of Title VII of the Civil Rights Act of 1964, as set forth in 42 U.S.C. §2000e-2(h), exempts a bona fide seniority plan from attack. *N.A.A.C.P. v. D.P.O.A.*, 900 F.2d 903 (6th Cir. 1990), P. A-94, 101-111. The appeals court held that the last-hired, first-fired seniority plan adopted by the collective bargaining agreement between the City and respondent DPOA was bona fide and exempt from attack under both constitutional and statutory civil rights provisions.

The Petition for Writ of Certiorari was submitted by Petitioners on September 17, 1990, but was not accepted by the Clerk of the Supreme Court because of procedural errors. The petition was revised and resubmitted, and Respondent DPOA received a copy of the revised petition on October 1, 1990. In that document, Petitioners assert five reasons for granting the writ of certiorari. Respondent DPOA contends that none of these reasons provides a basis for granting the writ, based upon the facts and arguments contained in this brief.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

The Court of Appeals opinion does not conflict with any decisions of other circuits.

In support of this reason for denying the Petition, Respondent DPOA relies upon and incorporates herein the argument set forth by the City in its Brief in Opposition to granting the writ.

II.

The Court of Appeals opinion does not conflict with any decisions of this Court.

In support of this reason for denying the Petition, Respondent DPOA relies upon and incorporates herein the argument set forth by the City in its Brief in Opposition to granting the writ.

III.

Any issues pertaining to 42 U.S.C. §1983 do not pertain to Respondent DPOA.

The District Court granted Respondent DPOA's motion for summary judgment on Petitioners 42 U.S.C. §1983 claim, as the actions of the DPOA did not constitute state action. *N.A.A.C.P. v. Police Officer's Association*, 676 F.Supp. 790, 791 (E.D. Mich. 1988), P. A-70. Petitioners had the opportunity to appeal that decision to the Sixth Circuit Court of Appeals when Petitioners appealed the District Court's determination that this matter was moot. However, Petitioners chose not to raise that issue on appeal and accepted the District Court's decision that the actions of Respondent DPOA did not constitute state action. The Supreme Court must not consider issues that were not presented to and decided by the court below. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). The Court of Appeals has not reviewed the applicability of 42 U.S.C. §1983 to Respondent DPOA, as Petitioners did not present that issue on appeal. Therefore, if this Court decides to review any issues regarding 42 U.S.C. §1983, that review should not include any claim against Respondent DPOA.

IV.
The Court of Appeals' opinion on union liability does not conflict with any rulings of this Court.

Court of Appeals findings on DPOA liability.

The Court of Appeals in its 1987 decision determined that Respondent DPOA had not breached its duty of fair representation to the minority members of the union under Michigan law.

The Court of Appeals stated the following:

> There is no finding of intentional discrimination by the union against its members. The District Court stated that the union had not been found guilty of intentional discrimination, and that its defense of the bona fide seniority provision was not improper. The District Court's finding of liability instead stemmed from the union's action 'as a whole' in response to the threatened layoffs, not its 'defense of any particular position.' To remedy this alleged breach of the duty of fair representation, the District Court ordered the union to integrate black officers into its leadership structure within one year.

N.A.A.C.P. v. D.P.O.A., 821 F.2d 328, 331 (6th Cir. 1987), P. A-63.

The Court of Appeals noted that Michigan law applies to the relationship between the union and its members, and that the union has a duty of fair representation under Michigan labor law. The Court of Appeals quoted from *Goolsby v. City of Detroit*, 419 Mich. 651, 664, 358 N.W.2d 856, 863 (1984), in defining that duty. It is composed of three responsibilities:

> (1) To serve the interests of all members without hostility or discrimination toward any, (2) to exercise its discretion with complete good faith and honesty, and (3) to avoid arbitrary conduct.

N.A.A.C.P. v. D.P.O.A., 821 F.2d at 332, P. A-64.

The Court of Appeals held:

> In our case, under Michigan law, a public employer's initial decision to layoff is a permissive subject of bargaining. Therefore, the union had no mandatory duty to act on behalf of its members in response to the threatened layoffs. Absent the duty to act, failure to act forcefully does not breach the union's duty of fair representation.

N.A.A.C.P. v. D.P.O.A., 821 F.2d at 332, P. A-65 (citations and footnote omitted).

The Court of Appeals also noted that the District Court did not find that the union was improperly motivated in its reaction to the layoff. Instead the District Court held that the union's mere failure to act was a breach of its duty of fair representation. The Court of Appeals stated:

> Absent a finding of intentional discrimination or other improper motivation, the union's mere failure to bargain forcefully enough in a permissible context does not by itself constitute bad faith or discrimination.

N.A.A.C.P. v. D.P.O.A., 821 F.2d at 333, P. A-66.

The Court of Appeals remanded the matter to the District Court for consideration of whether Respondent DPOA violated 42 U.S.C. §1981, as the District Court had not addressed that issue in its original opinion.

On remand, although the District Court denied Respondent DPOA's motion for summary judgment as to §1981, the District Court decided that the matter was moot, as blacks constitute a majority of the union and can protect themselves through intra-union political action against any acts that would deprive the members of their rights under that statute. *N.A.A.C.P. v. D.P.O.A.*, 685 F.Supp. 1004, 1007 (E.D. Mich. 1988).

Petitioners appealed the District Court's holding that the matters were moot. In *N.A.A.C.P. v. D.P O.A.*, 900 F.2d 903 (6th Cir. 1990), the Court of Appeals overruled the District Court, and held that the matters were not moot. However, the Court further held that Title VII exempts bona fide seniority plans from attack under 42 U.S.C. §1981.

The Court of Appeals dismissal of Petitioner's 42 U.S.C. §1981 claim is consistent with prior decisions of this Court.

Respondent DPOA hereby adopts and incorporates by reference the arguments presented by the City that §703(h) of Title VII protects bona fide seniority plans from challenges asserted under Title VII, 42 U.S.C. §1981 and 42 U.S.C. §1983. Additionally, Respondent DPOA submits the following arguments against granting the writ on this issue and responds to arguments by Petitioners directed at Respondent DPOA.

Petitioners cite *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), in support of their contention that a claim under 42 U.S.C. §1981 may not be barred by §703(h) of Title VII. However, *Johnson* in no way addresses the application of §703(h) to claims brought under 42 U.S.C. §1981. Although *Johnson* does point out that the Civil Rights Act of 1964 does not replace or exclude earlier acts, neither *Johnson* nor any other case cited by Petitioners holds that §703(h) does not apply to all civil rights claims. In *Pettway v. American Cast Iron Pipe Company*, 576 F.2d 1157 (5th Cir. 1978), the Court of Appeals held that bona fide seniority systems are protected by §703(h), whether the suit is brought under Title VII or §1981. The Supreme Court denied *certiorari*, 439 U.S. 1115 (1979). Other Circuit Courts have made similar decisions directly on this issue. *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339 (11th Cir., 1983); *Chance v. Board of Examiners and Board of Education*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965; *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

Petitioners also assert that several opinions of this Court regarding the co-existence of the Civil Rights Act of 1964 and earlier Civil Rights Acts have been misinterpreted or misconstrued by the Sixth Circuit in its opinion. However, even when one assumes that the Petitioners' interpretation of these decisions is correct, none of these cases prohibit the application of §703(h) to prior Civil Rights Acts. Petitioners have not presented any basis for their contention that §703(h) of Title VII cannot be applied to 42 U.S.C. §1981.

Petitioners have presented no basis for this Court's review of prior decisions on its fair representation claim.

Petitioners state that the Court of Appeals second and most recent opinion on this action addresses the issue of Respondent DPOA's duty of fair representation under state law. However, with the exception of references to its earlier decision and the decision by the District Court, the Court of Appeals was not faced with, and did not decide, the question of whether Respondent DPOA breached any duty of fair representation owed to the minority members of the union. The Court of Appeals in its 1988 decision held that the DPOA had not breached any duty of fair representation under Michigan law. Petitioners failed to petition this Court for writ of certiorari pursuant to Supreme Court Rule 13 within 90 days after the Court of Appeals entered its previous decision. Rule 13 states as follows:

> 1. A petition for writ of certiorari to review a judgment, in any case, civil or criminal, entered by a state court of last resort, a United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within *90 days* after the entry of the judgment. (Emphasis added.)

The Sixth Circuit Court of Appeals made a final decision as to the fair representation claim by reversing the District Court's decision that Respondent DPOA had breached its duty of fair representation. Petitioners failure to request certiorari after the Court of Appeals' decision bars Petitioners from any further review of that issue.

If this Court determines that Petitioners do have the right to have the issue reviewed, Respondent DPOA contends that no breach of its duty of fair representation has been committed.

Petitioners state that *Local 1277 A.F.S.C.M.E. v. City of Center Line*, 414 Mich. 642, 327 N.W. 2d 822 (1982), has been misconstrued by the Court of Appeals. Petitioners contend that *Local 1277* states that the *impact* of a layoff is a mandatory subject of bargaining.

However, a thorough reading of the *Local 1277* opinion makes it clear that the "impact" referred by the Michigan Supreme Court is only a mandatory issue of bargaining under state law when that impact relates to the wages, hours, and other terms and/or conditions of employment. Petitioners' quote from *Local 1277* is taken out of context, as the Michigan Supreme Court was quoting the *City's position* that motives behind layoffs are mandatory subjects of bargaining. The Michigan Supreme Court did not hold that under Michigan law layoffs are a mandatory bargaining subject or that layoffs of black police officers specifically affect the wages, hours, or other conditions of employment. The Sixth Circuit Court of Appeals' opinion holding that there was no breach by the union of its duty of fair representation under *state law* must not be reviewed.

V.

There is no action by Congress, either historic or current, which supports granting this petition.

Petitioners argue that Congressional action supports granting this petition. However, Petitioners fail to indicate how any Congressional action supports the review of this matter by the Supreme Court. It is true that Congress has stated in the Civil Rights Act of 1990 that the Act must be given broad interpretation. However, that Act has been vetoed by the President and is not in effect. Additionally, the 1990 Act cannot be used to interpet the Civil Rights Act of 1964, or any earlier Civil Rights Acts. Petitioners also cite several occasions where Congress enacted statutes

to override decisions by the federal courts which Congress viewed as unduly restrictive readings of statutes. It seems that Petitioners are asking this Court to take the place of Congress and take some action to change or alter plain and established interpretations of statutes that were under review in this matter. Respondent DPOA contends that legislative actions should be left to Congress, and therefore this Court should not grant the Petition for Writ of Certiorari on these grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied as the Sixth Circuit Court of Appeals' application of Title VII of the Civil Rights Act of 1964 to the Fourteenth Amendment and 42 U.S.C. §§1981, 1983, and 1985(3) is not in conflict with any decisions of this Court or any Circuit Court of Appeals. Furthermore, Petitioners have not preserved their claim under 42 U.S.C. §1983 or their claim that Respondent DPOA has violated its duty to represent fairly the Petitioners who are members of the DPOA, as Petitioners have not timely appealed the earlier opinions of the District and Circuit Courts regarding those issues.

Respectfully submitted,

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No. 90-569

IN THE

Supreme Court of the United States

October Term 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC.; BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTIHA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLAM A. HART, CHIEF,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO GRANTING THE WRIT

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A. City Respondents Have Distorted The Issues In This Case.

Petitioners make this reply because of our concern that Respondents have distorted the nature of the case and the record.

This case involves constitutionally-imposed afffirmative duties, not voluntarily adopted affirmative action. At issue and at stake are the continued vitality of this Court's rulings beginning with *Brown v. Board of Education (II)*, 39 U.S. 294 (1955) that the State has an affirmative and constitutionally based obligation to dismantle state-sanctioned and imposed intentional, *de jure*, racial discrimination and its effects. This Court has instructed the nation in an unbroken line of cases from *Brown* to *Paradise*,[1] and most recently in *Missouri v. Jenkins*, 110 S.Ct. 1659 (1990) and that this affirmative duty is in existence until all vestigial effects of the intentional discrimination or segregation are purged. This Court has held that the duty to dismantle the effects of state imposed and sanctioned intentional racial discrimination and segregation must is continuing and must proceed, regardless of the popularity or unpopularity of the relief ordered. *Alexander v. Holmes*, 396 U.S. 19 (1969); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1 (1971). Budgetary excuses cannot be raised to shield a failure to comply with constitutional duties.[2] *Missouri v. Jenkins, supra.*

City Respondents mention, but then ignore, findings of intentional discrimination made against the City and Police Department in *Baker v. City of Detroit*, 483 F.Supp 930 (E.D.

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[1] *United States v. Paradise*, 107 S.Ct. 1053 (1987).

[2] Consider the signal if this Court were to let the lower court's ruling stand. Such a ruling would allow cities and states throughout this nation to wink at their constitutional obligations whenever budgets are tight.

Mich 1979), *aff'd* sub nom *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983). District Judge Gilmore correctly characterized the import of the findings of intentional discrimination in *Baker v. City of Detroit, aff'd* sub nom *Bratton v. City of Detroit, supra,* as follows:

> "*Bratton* and *Baker* found that, at least until 1968, the City of Detroit 'employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations.[3] *Bratton, supra,* at 888.

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[3]Beginning on Page 940 of his Opinion in *Baker, supra,* Judge Keith documented the "History of past discrimination in the Detroit Police Department."

He called it a "sad and sorry history." (*Id.* at 940) He began with the 1943 race riot in Detroit and quoted from the report of the riot written by NAACP Executive Secretary Walter White and the now Justice Thurgood Marshall: "The trouble reached riot proportions because the police of Detroit enforced the law under an unequal hand." (*Id.* at 966) Judge Keith, ***inter alia***, found that from 1944 to 1953, 3005 whites and 117 blacks were hired in the department. This resulted in a virtually all-white police force. The supervisory ranks were virtually barren of blacks. The few blacks that were hired were strictly segregated. They were limited in their patrol assignments to certain areas and had to walk a beat until a vacancy in a "black" scout car opened up. A white officer's consent had to be obtained before he could be assigned to ride with a black officer. Blacks were used to do undercover work only in black areas. (*Id.* at 941-943) Judge Keith described the department's employment practices from 1954-1960 as remaining the same as they were between 1943 and 1954). By 1960 only 3 percent of the force was black (as compared with the Wayne County Sheriff's Department which was 30 percent black). (*Id.* at 942).

The first attempt to desegregate scout cars in 1959 was met with strong opposition by white officers. From 1960-1967, change was very slow. Between 1961 and 1966, 1080 whites and 86 blacks were hired. The number of blacks in command ranks was "truly minuscule." Judge Keith found that a key reason why the police department in 1967 was so overwhelming white (94 percent white to 6 percent black) was that the hiring process has been "riddled with discrimination for years." (*Id.* at 942-947)

Judge Keith also recounted the 1967-1974 employment practices in both

> Since the *Baker-Bratton* decisions were in the context of suits by white officers challenging the City's voluntary affirmative action plan, neither Judge Keith nor the Sixth Circuit had to reach the obvious corollary of these findings — that this consistent policy of intentional discrimination was in violation of the Fourteenth Amendment, which prohibits all invidious racial discrimination. *See Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). The record in *Baker* is 'replete with evidence', *Bratton, supra*, at 888, of invidious racial discrimination against blacks in the Detroit Police Department prior to 1968."
>
> *NAACP v. DPOA*, 591 F.Supp 1194-1199 (E.D. Mich 1984) (A.12-13) (footnote added)

City Respondents concede that the District Court found the City violated its "affirmative duty" but then proceed to ignore that any obligations or duties existed. District Court Judge

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Footnote 3 continued
hiring and promotions. (*Id.* at 948-958) The City's evidence, presented through the expert testimony of Alan Fechter confirmed the existence of discrimination in both hiring and promotion. (*Id.* at 958-965) Because *Baker* was a promotion case, the Court examined at length the promotion model in 1974 which was in existence when the challenged affirmative action plan was implemented. (*Id.* at 965-978). Judge Keith, at various times in his Opinion, commented on the deleterious impact the discriminatory practices of the Department had on the community and police-community relations. He described how the Department was justifiably regarded as an "occupation army" in the black community. The role of the police in the riots of 1943, 1967 and incidents thereafter showed the friction between the black community and the police to have been a trigger for these outbreaks. (*Id.* 996)

All of the evidence chronicled by Judge Keith from Pages 940 to 979 led him to conclude and find that, "In this case the evidence shows intentional discrimination against blacks through at least 1967-1968 when the Detroit riot caused people to sit up and take notice." (*Id.* at 992)

Gilmore not only noted the existence of the duties, he described them at length.[4]

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[4] "Based on these judicial findings of past discrimination it is clear the City had an affirmative obligation to eliminate the continuing effects of past racial discrimination and to eliminate all racial discrimination 'root and branch.' *Green v. County School Board*, 391 U.S. 430, 438, 88 S.ct. 1689, 1694, 20 L.Ed.2d 716 (1967). *See also Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 14, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971) *Keyes v. School District No. 1*, 413, U.S. 189, 200 n. 11, 93 S.Ct. 2686, 2693 n. 11, 37 L.Ed.2d 548 (1973). The City had notice of all of these judicial findings as of October 1, 1979 when Judge Keith's opinion in ***Baker*** was issued.

NAACP v. DPOA, supra, at 1200
(A.13)

* * *

In its motion for reconsideration of this Court's order of partial summary judgment, the City objects to the finding of intentional discrimination at the time the City began its layoffs in 1979, and attempts to attach particular significance to general definitions of intent in the racial discrimination field, which hold that foreseeable results and discriminatory impact, ***without more, do not establish discriminatory purpose***. *See e.g. Columbus Board of Education v. Penick*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1975), *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). This is not the situation here. Here we have the 'more' — the judicial findings of past intentional discrimination made by Judge Keith in *Baker*, and affirmed by the Sixth Circuit in *Bratton*.

Given this past finding of intentional discrimination, the City becomes liable every time it knowingly and foreseeably breaches its affirmative obligations to remedy this discrimination. The remoteness in time from the original act of intentional discrimination does not make later acts any less intentional. *Keyes, supra*. 'Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.' *Columbus Board of Education v. Penick, supra* 433 U.S. at 459, 99 S.Ct. at 2947. Thus, the City's discussion of the particular intent of the City in 1979-80 is post

The District Court furthermore found that the layoffs in 1979 and 1980 were infected with racial considerations contrary to City Respondents' assertion at Page 3. It was noted by the District Court and conceded by the City, that in 1979 and 1980, the City made a politically expedient decision that it would rather face a lawsuit by black police officers than white police officers.[5] *NAACP v. DPOA, supra*, at 1201 (A.18); *NAACP v. DPOA*,676 F.Supp 790, 796 (E.D. Mich 1988) (A.79).

The Respondents here, and the Court of Appeals below, simply misconstrue the nature of these findings and, consequently, of the appropriate remedies which flow from them. Because of this error, City Respondents argue that there is no conflict between circuits, nor conflict between this Court's decisions and decision of the Court of Appeals herein.

City Respondents suggest (*Id.* at 3) that Courts of Appeals "have consistently upheld the operation of last-hired-first fired seniority rules which typically govern employee lay offs —

Footnote 4 continued

> *Brown I* conduct of the school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.' (Citations omitted). *Dayton Board of Eduation v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 2979, 61 L.Ed.2d 720 (1979)."
>
> *NAACP v. DPOA, supra* at 1201, 1202 (A.17)

[5]This finding is not inconsistent with Judge Gilmore's finding ascribing no racial animus to *Mayor Young*. This Court has made clear that it is illegal to use racial factors in adverse employment decisions, regardless of whether the racial factors are based on the *animus* of the actors or the *political judgment* of the actors. See, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (wherein the court found Title VII and § 1981 were violated when a union, not found to have racial animus towards blacks generally, declined to press claims of racial discrimination because the union categorized such grievances as unworthy of pursuit).

. . . against challenges that such rules perpetuate the effect of past hiring discrimination." Several cases are listed for that proposition.

Omitted from the list of cases cited are *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir. 1982) and *Arthur v. Nyquist*, 712 F.2d 816 (2nd Cir. 1983) which are the two cases where, in the face of findings of intentional discrimination against state actors, the Court of Appeals *did modify seniority* requirements in order to prevent an abandonment of affirmative constitutional duties.[5] See also, *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983).

It is not constitutionally significant that the findings of intentional hiring discrimination in *Morgan, supra,* and *Arthur, supra,* were made in the context of school desegregation cases, where the constitutional rights of the students are of paramount concern.

Judge Keith in *Baker, supra,* found, nonetheless, that the discrimination in the Police Department impacted not only the individual officers, but the black citizens of Detroit. In Judge Gilmore's Opinions, both on liability and damages, he similarly found, "There are two constitutional violations which must be remedied — the harm resulting from the City's abandon-

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[6]The only case cited by City Respondents that involves layoffs by a state actor is *Chance v. Board of Examiners*, 534 F.2d 993 (2nd Cir. 197 6). *Chance* was brought under 42 U.S.C. § 1983 because at the time Title VII did not apply to municipalities.

The plaintiffs in *Chance* had challenged the discriminatory impact of a test that was required by the Board to promote administrators. The court found *de facto* — not intentional discrimination. It adopted an analysis similar to the one in *Griggs v. Duke Power* 401 U.S. 424 (1971) to invalidate the test. The layoff issue arose when it came time to determine dates of promotion for purposes of "excessing" administrators. *Chance, supra* simply did not involve findings of intentional discrimination against a state actor.

ment of its black officers and the harm to the black community if the police force is returned to the days of racial segregation." *NAACP v. DPOA, supra,* at 1204 and 1209 (A.23, A.32) Thus, just as the violations against the *black students* in *Morgan* and *Arthur* were held to justify employment relief as part of the remedy, so the finding by Judge Gilmore of violations against the *black citizens* herein permitted the employment relief ordered.

There is no case which Respondent has cited where § 703(h) of Title VII was used as a statutory bar to remedying a constitutional violation in a strictly constitutional case such as this one.

City Respondents state that because the layoffs in question were pursuant to an allegedly bona fide seniority system, and because the courts did not ascribe racial animus to Detroit and its officials, a determination that the layoffs violated the constitution is precluded. (City Response at 6)

This argument totally ignores the plethora of Supreme Court cases cited in the Petition that hold an abandonment of an affirmative duty is actionable regardless of the intent associated with the abandonment.[7] *Columbus Board of Education v. Penick, supra; Dayton Board of Education v. Brinkman, supra.* The duty arises from the findings of intentional discrimination and this court has consistently said no retreat from remedying the effects of that discrimination may be made until the job is complete. See *Green v. New Kent County, supra; Col-*

[7]Even though it was not necessary for the court to find race was a factor in the City's decision to lay off blacks in the Police Department, the District Court, as noted *surpa,* found the layoffs were racially motivated and that they were done with the full knowledge that they represented an abandonment of an affirmative remedial duty. *NAACP v. DPOA, supra* at 1199 and 1201 (A.12, A.28).

umbus Board of Education v. Penick, supra; Keyes v. School District No. 1 Denver, Colorado, supra.

Respondents seek to make much of the fact that Petitioners did not mention *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Petitioners omitted mention of *Wygant* because it is not applicable to this case. A careful reading of *Wygant* shows that if the findings of past intentional discrimination that exist in the present case had been made as an underlying predicate for the race-conscious collective bargaining agreement provision challenged in *Wygant*, this court would have most likely been unanimous in upholding some form of a racially proportionate layoff plan. But the present case does not implicate *Wygant*.

In the present case, there were clear findings of intentional discrimination. Furthermore, the seniority system was in no way abrogated in the relief ordered by the District Court.[8] In fact, there is nothing in the record to establish that the City had to solve its budgetary problems through massive layoffs in the Police Department. At that time, the Police Department was the *only* department controlled by the Mayor against which findings of intentional discrimination had been made. As established in the District Court, the City ignored the fact that cuts could have been made elsewhere in the City budget. Other cuts would have avoided the City's interference with the constitutional remediation within the Police Department.

The Court of Appeals ignored that no Title VII complaints were filed by Plaintiffs, yet insisted on applying Title VII as a limitation to constitutional remediation. Since no decision of this Court sanctions such as a result, the Petition for Certorari should be granted so that the legal errors below can be addressed and corrected.

[8]The relief provided, *inter alia*, for the recall by seniority of all officers, black and white.

B. DPOA Respondents Were Found Guilty Of Intentionally Discriminating Against The Black Officers.

In reversing the District Court's finding that Respondent DPOA had violated the duty of fair representation, the Court of Appeals stated there had been no finding of intentional discrimination by the union against its members or that its defense of seniority was improper. The Court of Appeals, nonetheless, recognized that the District Court's findings supported a 42 U.S.C. § 1981 claim because the case was explicitly remanded for findings on that issue. *NAACP v. DPOA, supra.* (A.66)

DPOA Respondents distort the record when they fail to mention that, on remand, the District Court made explicit what had previously been implicit in its ruling. *NAACP v. DPOA, supra,* (A.85) The District Court stated: ". . . it is impossible to fairly read the Court's findings concerning the DPOA's history, before, during and after the 1979 and 1980 layoffs without concluding that the DPOA was, indeed, guilty of intentional discrimination." *NAACP v. DPOA, supra* (A.81-82).

To imply that there were no findings of intentional discrimination against the union in violation of § 1981 in this record is to fundamentally distort the District Court's ruling on remand.

C. This Court May Consider The Duty Of Fair Representation.

At the time that the Court of Appeals reversed this District Court's ruling of the duty of fair representation claim in 1987, *NAACP v. DPOA,* 821 F.2d 328 (6th Cir. 1987), and remanded the § 1981 claim, Petitioners did not seek review of the case as the remand left open the possibility that errors could

be cured and the desired relief obtained. This Court has had occasion to review whether a party in Petitioners' situation must appeal before remand or forfeit review of an issue decided in a first appeal. In *Panama Railroad Co. v. Napier Shipping*, 166 U.S. 280,284 (1987), this Court, in deciding whether any such limitation on its review powers existed, held;

> ". . . No such limitation applies to this Court when in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such a writ, the entire case is before us for examination."

See also, *Christiansen v. Colt Industries*, 486 U.S. 800 (1988).

CONCLUSION

For these reasons, and the reasons stated in the original Petition, the request for the Writ of Certiorari should be granted.

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